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Supreme Court, U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

The Coalition for the Homeless,

Petitioner,

v.

Seawall Associates, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

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QUESTION PRESENTED

Whether the mere enactment of a temporary emergency law to reduce imminent homelessness by preventing displacement of low-income tenants and to alleviate current homelessness by preserving for a limited period the existing stock of single-room-occupancy ("SRO") housing amounts to a taking on its face where the law requires that existing SRO units be maintained in habitable condition and continue to be offered to the rental market, or be replaced; and provides for total or partial exemption of buildings that will not produce a return of at least 8.5% of assessed value if operated for continued SRO use.

**LIST OF PARTIES TO THE
PROCEEDINGS IN THE NEW YORK COURT OF APPEALS**

Plaintiffs-Appellants were Seawall Associates; Eastern Pork Products Co.; Durst Partners; Sutton East Associates; 86 Channel Club; Anbe Realty Co.; 459 West 43rd Street Corp.; Jambod Enterprises, Inc.; Mygutt/Perry; Felix Ziade; Rocco Imperial and Testamentum.

Defendants-Respondents were The City of New York, Edward I. Koch, in his capacity as Mayor of the City of New York; Paul A. Crotty, in his capacity as Commissioner of the Department of Housing Preservation and Development of the City of New York; and Charles Smith, in his capacity as Commissioner of the Department of Buildings of the City of New York.

Defendants-Intervenors-Respondents were Richard Wilkerson; Edgar Ferrell; Tom Williams; Danny Sogliuzzo; Nicholas Tallerico; and Coalition for the Homeless.

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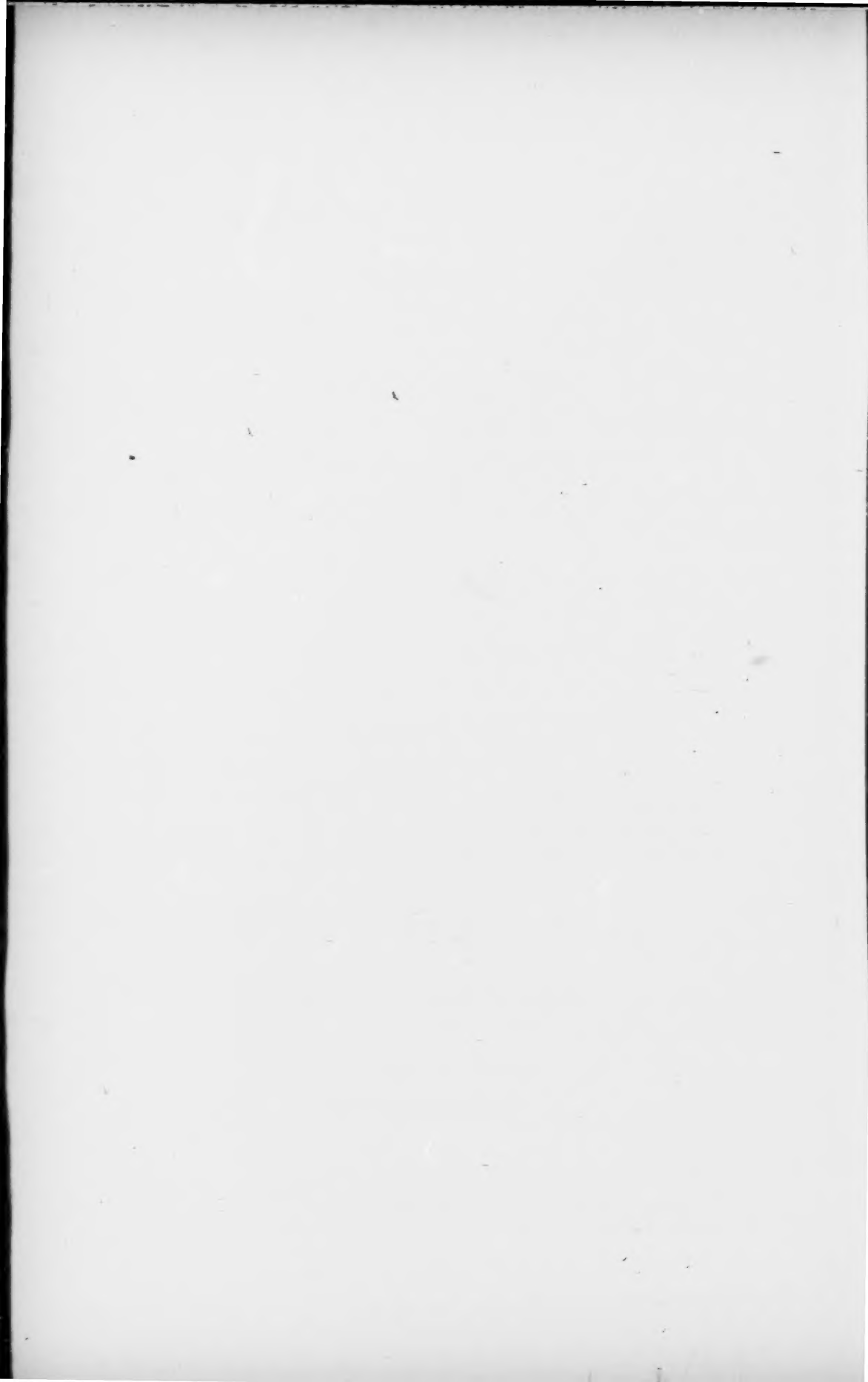
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

No. _____

The Coalition for the Homeless,
Petitioner,

v.

Seawall Associates, et al.,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS**

Petitioner prays that a writ of certiorari issue to review the judgment of the New York Court of Appeals entered in this case on July 6, 1989.

OPINIONS BELOW

The majority and dissenting opinions in the New York Court of Appeals are at A-1, of the Appendix filed with the petition for certiorari filed by the City of New York (The City of New York, et al., against Seawall Associates, et al., Case No. ____) for review of the same decision below (hereinafter cited as "App."). The opinion of the New York State Supreme Court, Appellate Division, First Department, is at App. A-207, and is reported at 142 A.D.2d 72 (1988). The opinion of the New York State Supreme Court is at App. A-165, and is reported at 138 Misc. 2d 96 (N.Y. Sup. Ct. 1987).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. § 1257 (a) (West Supp. 1989), to review the final judgment of the New York Court of Appeals, entered July 6, 1989.

The Court of Appeals decision invalidated an ordinance of the City of New York on the ground that it violates the Fifth and Fourteenth Amendments to the United States Constitution.

STATUTE AND CONSTITUTIONAL
PROVISION INVOLVED

Local - Law 9, which was declared unconstitutional in the decision below, is reproduced at App. A-253. The Fifth Amendment to the United States Constitution provides, in pertinent part: "nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This case arises out of emergency legislation enacted by the City of New York to stem the loss of single room occupancy ("SRO") dwellings -- a vital source of housing for low income single adults. After extensive study, the New York City Council determined that a

drastic decline in the number of these dwellings had created a "serious public emergency" by displacing large numbers of tenants and forcing them into the ranks of the City's homeless. In response, the City enacted Local Law No. 9 of 1987 ("Local Law 9"). Local Law 9 requires, for a stated moratorium period expiring in 1992, that SRO buildings be either maintained and kept on the rental market or replaced if withdrawn from the market. The law provides for partial or full exemption from its requirements upon a showing of financial hardship.

Respondents, a group of real estate developers, challenged the constitutionality of Local Law 9 on its face. With no factual findings, the New York Court of Appeals, two judges dissenting, reversed a unanimous intermediate appellate court and held the law violative of the U.S. and New York

Constitutions on the ground that it takes private property without just compensation.

Petitioner is a public interest organization that provides services to, and represents the interests of, homeless persons and persons at risk of becoming homeless. Petitioner intervened as a defendant in the trial court and participated actively in the proceedings below.

A. The SRO Emergency and the Legislative Response.

Uniquely affordable and suitable for supportive living arrangements for the elderly and disabled, SROs have long provided the housing of last resort for many of New York City's most vulnerable residents, particularly those who are mentally ill.¹ In recent years,

¹ SRO residents share bathroom and kitchen facilities. This arrangement creates a community living situation salutary to the frail and isolated population typical of SROs. Twenty-five percent of the residents are sixty years of age or older. Many have no traditional ties to

however, development for luxury housing or commercial space has eliminated thousands of SRO units; and thousands more have been withdrawn from the market, or "warehoused," by owners planning conversion or demolition.²

As the number of SRO units available for rent has declined drastically, increasing numbers of displaced tenants have been unable to find replacement housing; many have joined the ranks of New York City's homeless. R. 199, 188. The problem has been exacerbated by tenant harassment calculated to reduce the occupancy of SRO buildings in anticipation of development. R. 189, 207-13.

family, church or community groups, and are sustained by the relationships they form in SROs. Some SROs have on-site social service providers. Record on Appeal ("R.") 177-78, 683, 710.

² A real estate industry report estimates that, from 1971 to 1986, seventy-five percent of the buildings erected in midtown Manhattan were developed on sites formerly occupied by SRO properties. R. 185, 203.

Beginning in 1982, the City has taken legislative steps to preserve SRO housing and prevent further displacement of tenants. It has eliminated property tax abatements that had encouraged conversion; it has enacted criminal sanctions against unlawful evictions; and it has funded a special unit to prosecute SRO landlords. R. 222. In 1983, the City prohibited the issuance of permits for alteration or demolition of SRO buildings in the absence of a certification by the Department of Housing Preservation and Development ("HPD") that there has been no harassment of tenants during the preceding three years. N.Y.C. Admin. Code. § 17-198.

These measures proved inadequate to the crisis. In 1985, the City enacted Local Law No. 59. In its statement of legislative intent, the Council explained:

that a serious public emergency exists in the housing of a

considerable number of persons which emergency has been created by the loss of single room occupancy dwelling units housing lower income persons; that the loss of such housing units has caused serious hardship for occupants who have been forced to relocate; that adequate housing resources to effectuate relocation of such occupants do not currently exist; that many of such occupants are elderly and infirm persons of low income who are incapable of finding alternative housing accommodations; that a considerable number of such persons have become part of a growing homeless population; [and] that the intervention of the city government is necessary to protect such housing stock by imposing a moratorium on conversions, alterations and demolitions of single room occupancy multiple dwellings

Local Law No. 59, § 1 (1985). Supplemental Record (Record, Vol. 3) 34. That law imposed a temporary moratorium on the conversion, alteration or demolition of SRO dwellings. It also authorized the preparation of an independent study to determine "the best means of making available single room / occupancy

dwelling units and other housing for low income persons." Id.

The resulting study, Blackburn, Single Room Occupancy in New York City (Jan. 1986) (the "Blackburn Report"), is a detailed analysis of the loss of SROs in the context of the low-income housing crisis.³ The report concluded: "In the absence of further legal restraints, there will be a substantial loss of low-cost rooming units when the moratorium is over." R. 749. The report urged that the City "now act quickly to insure that the low-cost housing provided by single room units is preserved and expanded." R. 680. It recommended that the City extend the temporary ban on conversion, alteration or demolition and also impose a ban on warehousing "to prevent these single room units from being forever lost to the inventory." R. 730. It

³ The Blackburn Report is reproduced at R. 674-808.

also made specific recommendations to expand the SRO housing stock.

In response to the Blackburn Report, the City Council adopted Local Law No. 22, which continued the moratorium on SRO conversions through the end of 1986 and added an anti-warehousing provision requiring that vacant units be made habitable and offered for rent.⁴ The extension of the moratorium was

⁴ The Blackburn Report found that, of the approximately 64,000 SRO units remaining in New York City, some 6000 were vacant, largely due to warehousing. R. 678. In enacting Local Law No. 22, the City Council found that

prior to and during the moratorium been widespread withdrawal of single room occupancy dwelling units from the rental market, which has further reduced an already inadequate supply of such units, that this practice has contributed to the increasing homeless population, and that in order to further the objectives of local law fifty-nine and to maintain the availability of single room occupancy dwelling units for low income persons during the serious public emergency declared in such law, it is necessary and in the public interest to prevent owners from warehousing single room occupancy dwelling units during the moratorium.

Local Law No. 22, § 1 (1986)(R. 35).

intended to allow time for consideration of the Blackburn Report and for the development of a detailed response to the SRO emergency.

R. 35.

B. Local Law 9.

Immediately upon expiration of the moratorium, the City Council adopted Local Law No. 9 of 1987 -- a five year plan of regulation of SRO properties -- to address the serious public emergency created by the continued loss of SRO housing and the resulting increase in homelessness among former SRO residents.⁵ The law restricts the conversion, alteration and demolition of most SRO dwellings for five years. N.Y.C. Admin.

5

The regulatory scheme was originally enacted as Local Law No. 1 on February 2, 1987. It was subsequently amended and re-enacted as Local Law No. 9 on March 5, 1987.

Code § 27-198.2.⁶ During that period, the law requires SRO owners to maintain units in a habitable condition and to make a good faith effort to rent them. Id. § 27-2150.2152.⁷

⁶ The law is carefully designed to apply only to the remaining stock of SRO housing subject to loss through redevelopment. Thus, it exempts buildings that do not actually offer SRO housing, that have been vacant for a certain period of time, that are owned by the government, that are part of an approved project for the rehabilitation and preservation of SRO dwellings, or that contain 24 units or less and are intended for use as the owner's home. See N.Y.C. Admin. Code §§ 27-198.2(d)(1)(a), (b) and 27-198.2(b)(1)(d), (g).

⁷ Local Law 9 is only part of the City's effort to address the problem of homelessness. The City has launched a ten-year \$5.1 billion plan for housing, which "provides funds for the treatment of every vacant and occupied City-owned building and targets over 85 percent of its funds and units to families earning less than the City's median income." City of New York, Executive Budget Fiscal Year 1990, Message of the Mayor 208 (1989). Funds for the plan come from the City, the State of New York, and other public sources. Id. The City's fiscal 1990 Capital Budget provides \$908 million (\$664 million in City Capital funds) to support the ten-year plan. Id. 209. Thus, the burden of addressing homelessness in New York City does not rest solely, or even principally, on the private sector.

The law does not prohibit owners of SRO housing from developing their properties. SRO owners may withdraw the units from the market by providing for their replacement. Id. § 27-198.2(d)(4)(a). Replacement can take either of two forms: (1) payment to an SRO housing fund of the cost of replacing withdrawn units, currently set at \$45,000 per unit (the funds would be used to preserve, acquire, and develop housing affordable by low and moderate income persons); or (2) provision of replacement units through acquisition, rehabilitation, or new construction (replacement units would be sold or leased to a not-for-profit organization for operation).⁸

⁸ Because contributions to the fund may not result in immediately available alternative units, an owner of a building in which fifty percent or more of the SRO units are occupied may obtain an exemption for the occupied units by obtaining or developing actual replacement units. See N.Y.C. Admin. Code, §27-198.2(d)(4)(a). Where less than fifty percent of the units are occupied, an owner wishing to take advantage of the replacement or

Local Law 9 establishes an administrative procedure under which the Commissioner of HPD may grant a hardship exemption when an owner shows that, with SRO use, a property cannot earn a reasonable annual rate of return, defined as eight and one-half percent of its assessed value; and that utilization of the replacement provisions would substantially impair the feasibility of redevelopment. Upon such showing, HPD may eliminate or reduce the amount to be contributed to the fund or the number of replacement units to be provided, in order to withdraw SRO units from the market. Id. at §27-198.2(d)(4)(b).⁹

buy-out options must relocate the remaining tenants in comparable housing, at comparable rent, in the same borough of the City. Id. §27-198.3(a).

⁹

An owner may not make use of this exemption where his or her inability to earn a reasonable return is the consequence of intentional acts of mismanagement, designed to destroy the property's

C. Proceedings Below.

The trial court consolidated three related actions brought by respondents and converted their motions for preliminary injunctive relief to motions for summary judgment. 138 Misc. 2d 96 (N.Y. Sup. Ct. 1987).¹⁰ Without holding an evidentiary hearing, it granted summary judgment on the ground that Local Law 9 on its face violated respondents' due process rights and constituted a taking of their property without just compensation. The court enjoined the City from implementing or enforcing the law.

value as an SRO dwelling. N.Y.C. Admin. Code §27-198.2(d)(4)(b).

- ¹⁰ Respondents had earlier brought an action to enjoin enforcement of Local Law No. 22. Seawall Associates v. City of New York, 134 Misc. 2d 187 (N.Y. Sup. Ct. 1986). The trial court granted relief; but, instead of appealing, the City enacted Local Law No. 1 (and, later, Local Law 9), which in significant respects differed from those provisions in Local Law No. 22 that had been held unconstitutional.

The Appellate Division unanimously reversed, and upheld the constitutionality of Local Law 9 in all respects. 142 A.D.2d 77 (1988).

The New York Court of Appeals, two justices dissenting, reversed. It held Local Law 9 to be "facially invalid as both a physical and regulatory taking" in violation of both the U.S. and New York State Constitutions.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS NOT
SUPPORTED BY AN ADEQUATE AND
INDEPENDENT STATE LAW GROUND

The opinion of the New York Court of Appeals invoked no independent state law ground for its decision. The opinion contains no separate discussion of New York, as distinguished from federal, law. Indeed, the court expressly stated: "In view of this

holding, we need not decide the extent to which, if at all, the protections of the 'takings clause' of the New York State Constitution differ from those under the Federal Constitution." App. A-63 n.15. By any measure -- quantitative or qualitative -- the court relied primarily on federal, rather than state, law.

The opinion below has three brief references to the New York Constitution, App. A-8, A-12, A-62-63. All three were in conjunction with parallel references to the United States Constitution, and were made in conclusions from a single legal analysis principally of decisions of this Court. Thus, the references to the New York Constitution were not independent of the court's interpretation of the United States Constitution.

In these circumstances, the decision below does not rest on an adequate and

independent state law ground. Asarco, Inc. v. Kadish, 109 S. Ct. 2037, 2049 (1989); Harris v. Reed, 109 S. Ct. 1038 (1989); Michigan v. Long, 463 U.S. 1032 (1983).

II. THE DECISION BELOW IS CONTRARY TO DECISIONS OF THIS COURT.

The decision below rests on three conclusions: that (1) Local Law 9 works a physical taking of SRO properties because it limits the owners' right to exclude strangers from their properties; and that it also works a regulatory taking because (2) it denies the owners any economically viable use of the properties and because (3) it does not substantially advance a legitimate governmental interest. In all three of these crucial respects, the court's conclusions and its reasoning are contrary to decisions of this Court and are otherwise incorrect.

A. No Physical Taking.

The right to exclude others is obviously essential to any real enjoyment of premises devoted to private personal use by their owners. E.g., Kaiser Aetna v. United States, 444 U.S. 164 (1979); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). In those cases, a physical taking occurred because governmental action imposed unwanted members of the public upon property reserved by its owners for personal private use. In Nollan, the Court quoted from Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982), itself quoting Kaiser Aetna, 444 U.S. at 176, a passage emphasizing the importance of the right to exclude others, but the Nollan Court introduced the passage with its own words of explanation: "We have repeatedly held that, as to property reserved by its owner for private use" 483 U.S. at 831

(emphasis added). The Court thus recognized that the significance of the right to exclude others depends on the "privacy" of the use for which the property is adapted and held.

This Court has accordingly and repeatedly held that, in the case of property configured and used for public accommodation, a law authorizing physical entry by particular third parties not chosen by the owner, but otherwise in keeping with property's established use as a place of public accommodation, does not constitute a physical or other taking. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-61 (1964); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980). In Pruneyard, the Court commented that, in the circumstances presented, "the fact that [third parties] may have 'physically invaded' appellants' property cannot be viewed as determinative." 447 U.S. at 84. The reason

for that conclusion was that the owners had "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'" Id.

The plain message of these holdings is that, where personal privacy is not affected, limitation by government of rights to exclude others is not a per se or physical taking. Whether such a limitation then constitutes a taking depends on further analysis of the property's economic value. That kind of analysis relates not to the issue of physical taking, but rather to that of regulatory taking (discussed infra).

Here, the buildings subject to Local Law 9 are not and have never been reserved by their owners for their personal private use. Therefore, for these owners, the right to

exclude members of the public is not essential, as it was for the owners in Kaiser Aetna and Nollan.

To conclude that there is no physical taking in this case, the Court need not find that all SRO properties subject to Local Law 9 are already subject to exactly the same kinds and degree of public service obligations as the motel in Heart of Atlanta and the shopping center in Pruneyard. It is enough to see that, like a motel and a shopping center, and unlike a beach house or the marina in an exclusive waterfront development, an SRO building is designed for commercial dealings with members of the public at large. Thus, the entry of tenants into these buildings, pursuant to Local Law 9, does not constitute a taking because such entry serves the very purpose for which the buildings are currently configured and for which they have, in fact,

been used. This reasoning explains why there were not physical takings in other cases involving legally compelled entry or presence of tenants on rental premises, e.g., Block v. Hirsh, 256 U.S. 135 (1921) (Holmes, J.); Bowles v. Willingham, 321 U.S. 503 (1944).¹¹

¹¹ The court below sought to distinguish between a "stranger" to the rental premises seeking a tenancy there and a previously consensual tenant holding over after the expiration or termination of his lease. App. A-16-27. The proposed distinction is not responsive to any difference in circumstances that is relevant to the law of takings. With respect to contract or consent, there is no relevant difference: the holdover has no greater right based on contract or consent than does the "stranger." Moreover, the presence of the holdover may in some cases be more obnoxious to the landlord than that of the "stranger," especially where the landlord has sought to exercise a contractual right to terminate and evict. Society may have a somewhat greater interest in protecting an existing tenancy than in initiating a new one, and thus may give current tenants protections against both landlords and prospective tenants, but this societal interest ought not give a landlord greater constitutional rights against a new entrant than against a holdover, especially where there is no competition between new entrant and current tenant and therefore the landlord is not a proxy for the current tenant.

Loretto v. Teleprompter Manhattan CATV Corp. does not support a finding of a physical taking here. First, on the facts, there simply is no "permanent physical occupation," Loretto, 458 U.S. at 426. There is no "placement of a fixed structure on land or real property," id. at 437. There is no introduction onto the affected properties of exogenous material that permanently occupies them, as in, e.g., Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (permanent flooding), discussed at 458 U.S. at 427. There is no disruption of the current use of property due to the physical activities of government employees, as in United States v. Causby, 328 U.S. 256 (1946) (low level airplane flights), discussed at 458 U.S. at 430-31. There is no "actual taking of possession and control" by the government, as in United States v. Peewee Coal Co., 341 U.S. 114, 116

(1951), quoted at 458 U.S. at 431. In sum, the governmental action here does not constitute a physical taking "under the traditional test," 458 U.S. at 438.

Second, the Court in Loretto expressly distinguished the governmental action held to constitute a taking in that case from laws that regulate relationships, including right-of-occupancy relationships, between landlords and tenants and that do not "authorize the permanent occupation of the landlord's property by a third party." 458 U.S. at 440. Local Law 9 does regulate the relationship between landlords and tenants, and it does not authorize occupation of the premises by the person or property of any stranger to the landlord-tenant relationship.

Third, the instant case, unlike Loretto, does not involve a requirement that a property owner allow the permanent placement on his

premises of any physical object that he does not own. Any improvements needed to comply with the requirement to maintain SRO units in habitable condition will be the property of the owners. See 458 U.S. at 440 n. 19.

Finally, Loretto did not "question the . . . substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property." 458 U.S. at 441 (emphasis in original). Here, Local Law 9 requires that SRO buildings be continued in the use to which they have historically been devoted and for which they are still suited. Contrary to the decision below, under Loretto and other decisions of this Court, the question whether this regulatory effort constitutes a taking cannot be answered by calling it a physical taking, but only by analyzing the factors relevant to the doctrine of regulatory takings.

B. No Regulatory Taking.

Three factors guide analysis of whether a regulatory action constitutes a taking: the character of the action, its economic impact on the claimant, and the extent to which it interferes with investment-backed expectations. E.g., Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984).¹² The court below failed to analyze properly the character of Local Law 9, and it held erroneously that its mere enactment constitutes a regulatory taking because it denies the owners economically

¹² Effect on investment-backed expectations commonly is a factor in the analysis of regulations alleged to be takings. Here, however, as the court below correctly noted, App. A-31 n.6, that factor cannot be assessed because the challenge to the law was on its face rather than as applied. Moreover, the record contains no evidence and no findings of fact as to the legitimate expectations of current owners of SRO buildings.

viable use of their properties, and does not substantially advance a legitimate governmental interest. In reaching each conclusion, the court misread prior decisions of this Court.

1. Local Law 9 is a Landlord-Tenant Law, Intended to Reduce Imminent Future, and Alleviate Present, Homelessness

Local Law 9 falls within a long tradition of temporary measures enacted to address emergencies in the supply of housing -- a form of land-use regulation consistently upheld by this Court in an unbroken line of decisions over more than sixty years. "[A] public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. . . . Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present." Block v. Hirsh, 256 U.S. 135, 156 (1921) (Holmes,

J.) (war-time tenancy-extension and rent-control law). See also, e.g., Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921) (Holmes, J.) (same); Edgar A Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922) (emergency rent control); Bowles v. Willingham, 321 U.S. 503 (1944) (war-time rent control); Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948) (post-war rent control); Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983) (restrictions on removal of apartments from rental market); see also Pennell v. City of San Jose, 108 S. Ct. 849, 859 n.8 (1988) ("Particularly during a housing shortage, the social costs of the dislocation of low-income tenants can be severe.") (rent control law that takes into account hardship to tenant). In assessing the character of Local Law 9, the court below virtually ignored this line of decisions.

The distinctive features of Local Law 9 have support in prior decisions of this Court in analogous circumstances. The ordinance, by its explicit terms, is temporary. Cf. Block v. Hirsh; Bowles v. Willingham.¹³ The requirement to maintain habitability is analogous to the requirement to maintain historical landmarks "in good repair" upheld in Penn Central, 438 U.S. at 111-12, and the requirement to install sprinklers in pre-existing buildings upheld in Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946). The requirement to accept unwanted tenants (subject to the owner's right to reject

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In this respect, Local Law No. 9 imposes a less severe restriction on property than did the permanent restrictions on eviction upheld in Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875 (1983) (dismissing appeal for want of a substantial federal question). See id. at 878 (Rehnquist, J., dissenting) ("[a] limit in time, to tide over a passing trouble, may well justify a law that could not be upheld as a permanent change") (quoting Block v. Hirsh, 256 U.S. at 157).

particular individuals on appropriate grounds) is analogous to the requirements in, e.g., Block v. Hirsh (holdover tenants), Marcus Brown Holding Co. (same), and Heart of Atlanta Motel (black patrons of motel). The restriction of opportunities for development is analogous to the effect of New York City's Landmarks Preservation Law, upheld in Penn Central, 438 U.S. at 129-31. The requirement to continue in the operation of an SRO building is analogous to the restrictions on evictions upheld in Fresh Pond. Most fundamentally, the purpose of Local Law 9 -- to reduce imminent future homelessness and alleviate present homelessness -- is analogous to the purposes of the laws upheld in, e.g., Block v. Hirsh and Edgar A. Levy Leasing Co. See also Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934) (Hughes, C.J.) (statutory extension of period for

redemption of defaulted mortgage). These cases demonstrate that, in prior periods of widespread actual or threatened homelessness, this Court has permitted states and localities to pursue energetic and innovative temporary measures to address the problem.

2. No Denial of Economically Viable Use

The court below made essentially two arguments for its conclusion that Local Law 9 deprives owners of SRO buildings of economically viable use of their buildings. First, it stated that the owners "are forced to devote their properties to another use which . . . bears no relation to any economic purpose which could be reasonably contemplated by a private investor." App. A-36. For that reason, the court held, the law abrogates or substantially impairs the owners' rights to possess, use, and dispose of their properties. Id. at A-34-36. Second, expressly employing

the methodology of "conceptual severance,"¹⁴ the court held that the law totally destroys the right to convert SRO properties to different uses, and that "the permanent abrogation of one of those rights without regard to its comparative value in relation to the whole . . . may well be sufficient to constitute a taking," id. at A-41, and does so here. Each argument reflects a rejection of certain of this Court's prior decisions and a misapplication of others to the circumstances of this case.

14 "Conceptual severance" is the technique of analyzing a party's total package of rights and liberties with respect to particular property into distinct interests and deciding whether a taking has occurred by focusing on the effect of governmental action on a particular interest by itself, rather than on the effect of the governmental action on the party's rights in the property as a whole. See Radin, The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1676 (1988).

First, Local Law 9 requires owners to continue temporarily the existing use of SRO buildings, which have been highly regulated for many years. Therefore, it is flatly incorrect to say that the law requires a use that "bears no relation to any economic purpose which could reasonably be contemplated by a private investor." See Penn Central, 438 U.S. at 136. Moreover, the law does not destroy the right to convert; it merely conditions it on replacement of withdrawn units.

Second, the court's prognostications about economic viability defy "this Court's oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 294 (1981). "Adherence

to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property," in view of the "essentially ad hoc, factual inquiries" relevant to the analysis, particularly questions regarding "the economic impact of the regulation." Id. Accordingly, where, as here, a land-use regulation is challenged on its face, "the only issue properly before the [court] is whether the 'mere enactment' of the [regulation] constitutes a taking." Id., quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). See generally Pennell, 108 S. Ct. at 856-57; Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 494-95 (1987).

Ignoring these admonitions, the court below relied on its own arm-chair factual assessments both of the economic viability of continued SRO use of the buildings and of the

likely returns that owners would receive upon sale or development. See App. A-26. These speculations have no basis in the record. Such disregard for this Court's strictures in Hodel, Agins, Pennell, and Keystone against facial invalidation of regulations as takings requires swift correction.

Third, the Court of Appeals misconstrued the economically-viable-use test. The test is not satisfied by mere diminution in value, even if severe. E.g., Penn Central, 438 U.S. at 125; Keystone, 480 U.S. at 488-89 n.18; Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962). There is a taking only if the governmental action leaves no economically viable use. See, e.g., Penn Central, 438 U.S. at 124-38; Agins, 447 U.S. at 260; Keystone, 480 U.S. at 493-99.

Here, although the court below concluded that continued use of the SRO buildings for

SRO use is less profitable than alternative uses, it did not address the only legally relevant question: whether the ordinance permits no economically viable use. The court did acknowledge that "[i]t is highly unlikely that any of the properties, which must be kept fully rented, will ever produce less than 8-1/2% assessed value, even though the properties are subject to rent control and rent stabilization." App. A-56-57. It did not determine, however, whether that rate of return is insufficient for economic viability,¹⁵ nor did it consider whether the cost of replacing withdrawn units would

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Nothing in this Court's prior decisions suggests that that rate of return is insufficient. Indeed, the court below had, itself, previously upheld against constitutional attack a rent-control law that provided for that very rate of return; and this Court found no substantial federal question. Benson Realty Corp. v. Beame, 50 N.Y.2d 994, 431 N.Y.S.2d 475, 409 N.E.2d 948 (1980), app. dismissed, sub nom. Benson Realty Corp v. Koch, 449 U.S. 1119 (1981).

necessarily make any redevelopment of SRO properties unprofitable; and of course, it had before it no evidence or findings of fact that would support any such determinations. For that reason, the court's conclusion that the law denies to owners of SRO properties all economically viable use of their property cannot stand.

Fourth, like its analysis of economic viability, the court's foray into conceptual severance adopts a methodology repeatedly rejected by this Court. E.g., Penn Central, 438 U.S. at 130 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) ("[T]he denial of one traditional property right does not always amount to a taking. At least where an owner

possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."); Keystone, 480 U.S. at 497-502.

The court below relied for its methodology on Hodel v. Irving, 481 U.S. 704 (1987), and Nollan. App. A-40-43. Neither decision supports it.

In Irving, the Court cited both Penn Central and Keystone, inter alia, as establishing "the framework for examining the question of whether a regulation of property amounts to a taking." 481 U.S. at 713. The Irving Court also implicitly rejected conceptual severance when it commented that Congress might abolish the right of intestate descent, 481 U.S. at 718. The flaw in the statute at issue was that it abolished both descent and devise, and, furthermore, did so.

"even in circumstances when the governmental purpose sought to be advanced, consolidation of ownership of Indian lands, does not conflict with the further descent of the property," id. Moreover, Justice Scalia (who later wrote for the Court in Nollan) noted in his concurring opinion that "the balance between rights taken and rights left untouched . . . is determinative." 481 U.S. at 719. That balancing approach is the exact opposite of conceptual severance.

Even if Irving were read as authorizing a form of conceptual severance, that form would not apply here. The Court emphasized that it was the "complete abolition" of the right to pass property at death, in both its forms (devise and descent), that constituted the taking. 481 U.S. at 716-17. What made the claim of a taking compelling was the perception that a right in some way to pass on

property at death is essential to ownership as traditionally and commonly understood: if an individual owner cannot pass on property at death, then, in some sense crucial to ordinary understanding, he or she does not own it. If Irving authorizes conceptual severance, it does so only in the limited circumstances where governmental action deprives an owner of rights that go to the heart of the common understanding of ownership, as do enforced physical occupations of property held for personal private use and total deprivations of the right to pass on property at death. The property interests affected by Local Law 9 are not of that character. A temporary requirement that an owner of rental property continue to rent it for an adequate return, unlike the statute in Irving, does not violate the common sense understanding of ownership.

Nor does the Court's opinion in Nollan endorse conceptual severance. Although the regulatory action at issue was analogized to the taking of an easement, the constitutional flaw was not that it totally deprived the owners of a conceptually severed interest, but that by granting public access to a parcel of land reserved for personal private use it severely hindered enjoyment of the parcel as a whole; and it did so, furthermore, by attaching to the grant of a permit a condition that "utterly fail[ed] to further the end advanced as the justification for" the condition, 483 U.S. at 837.

Conceptual severance is potentially a cancer in the jurisprudence of takings. This case presents an opportunity for the Court to extirpate it and prevent its spread.

2. Local Law 9 Substantially
Advances A Legitimate
Governmental Interest

The court below relied on Nollan to hold that an especially "close nexus" is required between a legitimate governmental interest and the regulatory measure at issue. Applying that test, it held that Local Law 9 fails to advance substantially a legitimate governmental interest. Nollan, however, provides no support for the court's analysis.

It is not clear whether Nollan created any new generally applicable requirement of a particularly close nexus between governmental ends and means. First, the case, itself, was decided under the test of whether the permit condition was "reasonably related to the public need" Id. at 438. Second, the decision turned on the perpetration, in effect, of a physical taking. Had the Coastal Commission simply expropriated outright the easement of access, its action plainly would have been a physical taking. 483 U.S. at 831-

32. The Commission structured its action, however, as a condition on a permit, and argued that therefore it should not have to pay compensation. The Court's responsive demand for a nexus between the access condition and the asserted regulatory purpose was a demand for assurance that a regulatory condition was not being used manipulatively to avoid paying for what would otherwise be a physical taking. Any general extension to economic regulatory statutes of a "close nexus" requirement or a similarly strict standard of review of governmental means and ends would involve an overruling of, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."), and, as the dissenters below suggested, App. A-67-70, a

return to Lochner v. New York, 198 U.S. 45, 57-58 (1905) ("The act must have a more direct relation, as a means to an end . . .").

Third, the permit condition was imposed by an administrative rather than a legislative body. Language in Nollan suggestive of a special nexus requirement may relate only to that context, and may not necessarily extend to the evaluation of legislation. Legislative bodies traditionally are given more deference with respect to means and ends than are administrative bodies. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 n.9 (1983).

Moreover, the issue in Nollan required no expertise and no complex analysis. The Court held that the permit condition "utterly fail[ed] to further the end advanced as [its]

justification" 483 U.S. at 837. See also id. at 838-39.

Here, on an issue that is complex, and that requires expertise, the court substituted its empirical judgment for the carefully considered findings of the New York City Council. It determined that the law "would do little to resolve the homeless crisis," App. A-47, and it characterized the relation between the law and the problem of homelessness as "indirect at best and conjectural," id. at A-49. Even if the court's views on this empirical question could be considered more reliable than those of the legislative body, they would still furnish no basis for holding the law unconstitutional. If every statute that restricts property rights and does only "little" to resolve a major and complex societal problem were a taking, very little state and local land-use

regulation would survive. The standard imposed by the court below is contrary to Nollan and to numerous decisions of this Court, cited supra, upholding regulatory actions against takings challenges.

Finally, it is self-evident that, by preventing displacement of tenants and preserving existing SRO units, the law substantially advances the legitimate governmental interests of reducing imminent future homelessness and alleviating current homelessness. Preserving the cheapest form of housing and requiring it to be offered on the rental market is a straightforward, direct way to protect those most likely to become homeless and to make additional housing units available to those who are now homeless.

The City Council, unlike the court below, correctly read the Blackburn Report's conclusion that, although the long-term

solution to the problem of homelessness in New York City will involve far more comprehensive action than Local Law 9, such a law is necessary to deal effectively with the immediate problem of displacement and resulting homelessness among those dependent on SRO housing and as a stopgap while a longer-term program is developed. R. 731-32.

In sum, the court below erred in applying the nexus requirement of Nollan, and a decision is needed by this Court to correct that error and give guidance to other courts that will consider similar issues.

II. THE DECISION BELOW CONFLICTS
WITH OTHER LOWER COURT
DECISIONS

In recent years, local legislative efforts to address homelessness have focused in part on the disappearance or warehousing of low income rental units due to the workings of the real estate market in large and small

cities. Several of those efforts have been tested in the courts, and the results are in conflict with the decision below.

In Help Hoboken Housing v. City of Hoboken, 650 F. Supp. 793 (D.N.J. 1986), the city had determined that "the elimination of a substantial portion of the existing affordable rental housing stock, and insufficient new construction of affordable rental housing . . . have caused a substantial and increasing shortage of rental housing affordable by families of low and moderate income." See 650 F. Supp. at 796. The warehousing of vacant units was found to cause "severe economic and physical hardships to tenants" Id. Therefore, the city enacted an ordinance that prohibited the withholding of rental units from the market, with certain exceptions. Rejecting some of the very arguments accepted by the court

below, the court in Help Hoboken found that the ordinance did not constitute a taking.

Similarly, in Terminal Plaza Corp. v. City & County of San Francisco, 177 Cal. App. 3d 892, 223 Cal. Rptr. 379 (1986), the court upheld against a takings challenge an ordinance that severely restricted the conversion of residential hotels to other uses. In effect, it permitted conversion only if an owner made a one-for-one replacement of the units being converted. 223 Cal. Rptr. at 381. The owner's argument that the ordinance constituted a taking was rejected. Id. at 390-91.

Finally, in Troy, Ltd. v. Renna, 727 F.2d 287 (3d Cir. 1984), the court upheld against constitutional attack a New Jersey statute that extended tenancies of eligible "senior citizens" and their surviving spouses and eligible "disabled" persons for up to 40 years

(beyond a notice period and stays authorized by other statutes) after a building had otherwise been converted to condominiums. The court held that the statute served "a broad remedial purpose" and was not a taking.

See also Nash v. City of Santa Monica, 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894, 897-98 (1984) (upholding, against due process claim of right to go out of business, ordinance that prohibited demolition of rental housing unless stringent conditions were met); Flynn v. City of Cambridge, 418 N.E.2d 335 (Mass. 1981) (upholding against takings challenge ordinance providing that where rental unit is converted to condominium it may not be withdrawn from rental market; same ordinance at issue in Fresh Pond).

III. LOCAL LAW 9 IS A POTENTIAL
NATIONAL MODEL FOR TEMPORARY
EFFORTS TO ADDRESS
HOMELESSNESS, AND ITS
CONSTITUTIONALITY SHOULD
BE DECIDED BY THIS COURT

Homelessness is a growing problem in many cities across the United States. Its origins are complex, and may vary from one community to another. While comprehensive solutions are under consideration, something must be done to address the plight of the currently homeless and the imminently homeless.

Local Law 9 is a potential model approach to that short-term phase of the problem. The usefulness of that model would be destroyed, however, if the decision below were to be the last word on its constitutionality. The financial risks to local governments from enacting legislation subsequently declared to be a taking were greatly increased by this Court's decision in First English Evangelical

Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). While it remains unreviewed by this Court, the decision below will provide a powerful disincentive to enactment by other local governments of legislation similar to Local Law 9. Thus, the issue presented in this case is national in scope; and it warrants the granting of the writ.



CONCLUSION

For the foregoing reasons, this Court should grant certiorari in this case.

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IN THE
Supreme Court of the United States
October Term, 1989

THE CITY OF NEW YORK, *et al.*,

Petitioners,

against

SEAWALL ASSOCIATES, *et al.*,

Respondents.

THE COALITION FOR THE HOMELESS,

Petitioner,

against

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Respondents.

RICHARD WILKERSON, *et al.*,

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On Petitions for a Writ of Certiorari
to the New York State Court of Appeals

**BRIEF IN OPPOSITION OF RESPONDENT
SEAWALL ASSOCIATES**

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

THE CITY OF NEW YORK, *et al.*,
-against- *Petitioners,*

SEAWALL ASSOCIATES, *et al.*,
Respondents.

THE COALITION FOR THE HOMELESS,
-against- *Petitioner,*

SEAWALL ASSOCIATES, *et al.*,
Respondents.

RICHARD WILKERSON, *et al.*,
-against- *Petitioners,*

SEAWALL ASSOCIATES, *et al.*,
Respondents.

**On Petitions for a Writ of Certiorari
to the New York State Court of Appeals**

**BRIEF IN OPPOSITION OF RESPONDENT
SEAWALL ASSOCIATES**

Respondent Seawall Associates ("Seawall") respectfully
urges that this Court deny the petitions for a writ of certiorari,

seeking review of the opinion of the New York State Court of Appeals.¹

COUNTERSTATEMENT OF THE CASE

Seawall will not respond here to the many misstatements and references to matters *dehors* the record in the descriptions of the case contained in the three petitions, except to note that it takes issue with the petitioners' argumentative presentations of the facts herein. Because the relevant provisions of New York City Local Law 9 of 1987 ("Local Law 9"), which was declared unconstitutional in the judgment sought to be reviewed, as well as the relevant underlying facts of this case, are adequately stated in the published opinions of the Supreme Court, New York County, the Appellate Division and the Court of Appeals, Seawall respectfully refers this Court thereto. See *Seawall Assocs. v. City of N.Y.*, 134 Misc. 2d 187, 189-92 (Sup. Ct. N.Y. Co. 1986) (Saxe, J.) (omitted from the City's Appendix); *Seawall Assocs. v. City of N.Y.*, 138 Misc. 2d 96 (Sup. Ct. N.Y. Co. 1987) (Saxe, J.) (see A-166-183); *Seawall Assocs. v. City of N.Y.*, 142 A.D.2d 72 (1st Dep't 1988) (see A-109-142); *Seawall Assocs. v. City of N.Y.*, No. 127, slip op. (N.Y. July 6, 1989) (see A-2-10).

REASONS WHY THE PETITIONS SHOULD BE DENIED

1. This Court is Without Jurisdiction to Hear This Case

This Court has long recognized that it does not possess jurisdiction to review state court decisions rendered on the basis of independent and adequate state constitutional grounds, even though federal questions may also be involved in the case. See

¹ Opinion reprinted in the Appendix to the Petition of the City of New York, *et al.* (the "City's Petition") at page A-1. Parenthetical citations preceded by "A" refer to the Appendix to the City's Petition; those preceded by "R" refer to the first and second volume of the Record on Appeal filed in the Court of Appeals; and those preceded by "SR" refer to the third volume of the Record on Appeal (which had been denominated "Supplemental Record" in the Appellate Division).

Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); see also *Harris v. Reed*, __ U.S. __, 109 S. Ct. 1038 (1989). As long as the state court has made a "plain statement" indicating that there is an independent and adequate state law ground for its opinion, this Court does not have the power to hear the appeal. Thus, in *Michigan v. Long*, 463 U.S. 1032 (1983), this Court declared that, "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.* at 1041.

In several specific instances, the opinion of the New York State Court of Appeals adequately and independently relied on New York State constitutional requirements, independent of federal constitutional law, in striking down Local Law 9. (See, e.g., A-3, A-5, A-9-10, A-12, A-61-63 (particularly at fn. 15) and A-65-66.) In these circumstances, even if the Court of Appeals' ruling with respect to the federal questions presented were arguably wrong, it would be superfluous, because the same judgment would plainly be rendered by the State court in this case *even if* its view of federal law were to be "corrected" by this Court, thus reducing any review by this Court to "nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

Significantly, the Court of Appeals, in footnote 15 of its opinion, underscored the rule that the takings clause of the New York State Constitution need *not* be interpreted in the same manner as this Court has interpreted the federal takings clause—i.e., the protections granted property owners by Article 1, section 7 of the State Constitution may be *broad*er than those guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution.²

² While states are allowed freedom to adopt and enforce their own constitutions and statutes, this Court has made clear that the requirements of the U.S. Constitution establish the "minimum" protection to which all are entitled. *Mills v. Rogers*, 457 U.S. 291, 300 (1982). Thus, the freedom which the states enjoy, and which the New York Court of Appeals could properly have exercised in this

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The Court of Appeals noted, however, that since, in this case, it had expressly and plainly found Local Law 9 to be facially invalid under *both* the federal and the state constitutions, it did "not [need to] decide the extent of which, if at all, the protections of the 'takings clause' of the New York State Constitution differ from those under the Federal Constitution." (A-63 fn. 15.) Thus, if this Court were to find that the Court of Appeals misconstrued the federal Constitution, that conclusion would be academic in terms of this case. The Court of Appeals is the final arbiter of the New York State Constitution and there is no suggestion that its interpretation thereof violates the federal Constitution. Therefore, Local Law 9 is invalid as an uncompensated taking under the New York State Constitution, and there is an independent and adequate state ground for the Court of Appeals' decision. Footnote 15 of its opinion is a "plain statement" by the highest state court indicating that there is an independent and adequate state law ground for the decision, thus rendering any differences between the federal and state takings clauses irrelevant in this case. See *Michigan v. Long*, 463 U.S. at 1041.³ As a result, there is no jurisdictional basis for Supreme Court review herein, and the petitions should accordingly be denied.

2. This Court's Prior Decisions Concerning the *Per Se* Physical Taking Doctrine Fully Support the Decision Below

The Court of Appeals' holding that Local Law 9 would result in an invalid physical taking requiring compensation under the Fifth Amendment is *not* contrary to any of the decisions of this

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case if it had found such action to be necessary, is to provide *more* protection under the state constitution than the federal Constitution requires, not less. See *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676-77 (1923); see also *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).

³ The petitioners' attempts to base *their* arguments (that there was *no* adequate and independent state ground) on this *very statement* is most curious indeed. (See City's Petition at 23; Petition of The Coalition for the Homeless (the "Coalition's Petition") at 19-20.)

Court which are pointed to by petitioners. (See City's Petition at 10-14; Coalition's Petition at 22-29, joined in on this point by the Petition of Richard Wilkerson, *et al.* ("Individual Intervenors' Petition") at 20.) As the carefully reasoned discussion (reproduced at A-12 through A-29) in the opinion itself demonstrates, the Court of Appeals properly applied the teachings of this Court's pertinent decisions in determining that a *per se* physical taking existed in this case. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); see also *United States v. Causby*, 328 U.S. 256 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *United States v. Lynah*, 188 U.S. 445 (1903); *Pumpelly v. Green Bay Co.*, 80 U.S. 577 (1871); cf. *Bowles v. Willingham*, 321 U.S. 503 (1944). The "conflicts" perceived by petitioners between the above-cited decisions and that of the Court of Appeals in this case are strictly illusory.⁴

Firstly, the City's assertion of "conflict" as to the finding of a physical taking in this case relies primarily on its erroneous belief that so long as a law somehow affects "the landlord-tenant relationship," it is *ipso facto* immune from constitutional just compensation requirements. As the Court of Appeals correctly found, this theory is simply incorrect (see A-23-27). The very purpose of the "rent-up" provisions of Local Law 9 (see A-6-7) is to attempt to create new landlord-tenant relationships where none exist. Existing landlord-tenant relationships, on the other hand, are wholly governed by different and independent New York laws—Local Law 9 is an entirely different category of regulation.

⁴ Other cases cited in the petitions are either manifestly inapposite in this regard or are not controlling as binding precedent in this case. Cf., e.g., *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Callahan v. Fresh Pond Shopping Center, Inc.*, 388 Mass. 1051, 446 N.E.2d 1060, appeal dismissed, 464 U.S. 875 (1983); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958).

The decisions relied upon by the City are sharply distinguishable from the present case. For example, this Court did *not* subject the rent control law challenged in *Pennell v. City of San Jose*, 485 U.S. 1, 108 S. Ct. 849 (1988), to a takings analysis at all. Rather, the majority merely held in *Pennell* that the ordinance at issue was not facially "irrational" under the "deferential" *due process* standard applicable in that case. *See id.* at 859.⁵ The takings claims asserted in *Pennell* were felt by the majority of this Court to be premature (and were therefore not addressed at all) because, absent enforcement, there was no evidence that the challenged "tenant hardship" clause would ever actually be relied upon to reduce a rent below the figure it would have been set at on the basis of the other six (concededly valid) factors specified in the law.⁶

Similarly, the emergency wartime rent control statute upheld in *Bowles v. Willingham*, 321 U.S. 503 (1944), did *not*, as the City claims, "restrict landlords' ability to determine whether their residential properties [would] be rented." (City's Petition at 11.) That law merely set maximum rents in certain designated "defense rental" areas, and it explicitly provided that it did *not* re-

⁵ It is highly significant that, in *Pennell*, the challenged ordinance *did not* apply, by its own terms, "to the rental of a unit that has been voluntarily vacated" or "that is vacant as a result of eviction for certain specified acts," 108 S. Ct. at 854 n.2, and thus did not, in any event, share one of the most inherently invasive and confiscatory features of the local law at issue in this case. (See A-13-15, A-26.)

⁶ Such a showing was found necessary in that case since, *inter alia*, under the San Jose ordinance, consideration of "tenant hardship" was to result in *permissive*, and not mandatory reductions in rent.

It is worth noting, nevertheless, that the six Justices joining in the *Pennell* majority opinion *explicitly* acknowledged the lack of a substantial causal nexus between the landlord's actions and the tenant's hardship (as required to overcome a taking claim under *Nollan*) in that case. *See id.* at 859. Seawall submits that, while the lack of any reasonable causal nexus was found by the majority to be "beside the point" in *Pennell*, for purposes of the deferential "rational relationship" test of due process analysis, it would be *quite* relevant, or even determinative, to any takings analysis under the newly applicable stricter test set forth in *Nollan*, in which this Court unequivocally heightened the standard of review. (See *infra* at pp. 24-25.)

quire "any person . . . to offer any accommodations for rent." *Id.* at 517. This stands in "sharp contrast" to Local Law 9, which requires respondents, against their will, to allow new tenants, previously unknown to them, to enter their property and take physical possession of it; thus acquiring possessory interests under other existing state rent control laws which are extraordinarily difficult, if not impossible, to sever and which can protect them indefinitely from eviction. (See A-26.) Any use of the real estate other than as an SRO is effectively forbidden by Local Law 9. In explaining why the law challenged in *Bowles* did *not* effect a "taking" of property, this Court emphasized that "[t]here [was] no requirement that the apartments in question be used for purposes which [brought] them under the Act." *Id.*

Respondents do *not* challenge the constitutionality of emergency rental housing legislation prohibiting the eviction of *tenants-in-possession* whose leaseholds have expired, which was first upheld by this Court in *Block v. Hirsh*, 256 U.S. 135 (1921), and which was *not* questioned by the Court of Appeals in this case. (See A-23-26.) However, the *Block* case and its progeny, relied upon by petitioners, have no bearing on the validity of Local Law 9's distinctly more onerous rent-up and fix-up requirements, which purport to compel Seawall and other owners of buildings containing (or formerly containing) SRO units to render derelict vacant units habitable (at considerable expense), and to accept total strangers as tenants of space which they desire to keep empty (or demolish and replace with other permitted uses). See also *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948). (Also relied on in the Coalition's Petition at 31-35.)⁷ The fact is that Local Law 9 is *not*

⁷ Petitioners also repeatedly cite *Callahan v. Fresh Pond Shopping Center, Inc.*, 388 Mass. 1051, 446 N.E.2d 1060, appeal dismissed, 464 U.S. 875 (1983), as being binding precedent of this Court which supports their position. However, *Callahan* is an extremely weak "support" on which to rely, as it was "a case that

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classifiable simply as "landlord-tenant" regulation—indeed, it "adjusts" neither rents nor evictions, nor does it in any manner alter the landlord-tenant relationship under existing laws—and it is also plainly *not* merely a "restriction on use"⁸; but, to the contrary, deprives respondents of *all* use of their property except that imposed upon them, against their will, by the City. Indeed, even the City itself concedes that Local Law 9 "go[es] beyond traditional rent control [regulation]." (City's Petition at 21.)

Similarly, an entirely novel and utterly unsupported theory is posited by the intervenors-petitioners: that by grafting some undefined "personal privacy of use" requirement onto the Fifth Amendment's conception of protected "property," the "right to exclude others" may be made inapplicable to all "rental premises," and thus, to the case at bar. (See Coalition's Petition at 22-26, 44.) This proposition cannot withstand even cursory scrutiny. The Coalition (joined by the individual intervenors on this point) tries to "distinguish" such cases as *Nollan*, 483 U.S. at 825; *Kaiser Aetna*, 444 U.S. at 164; and *Loretto*, 458 U.S. at 419, on the ground that they involved "property reserved by [their] owners for personal private use" (Coalition's Petition at 22) while this case

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ha[d] produced no prevailing written opinion at any level. The trial court published no opinion, the Supreme Court of Massachusetts summarily affirmed the judgment by a tie vote (446 N.E.2d 1060), and [this] Court summarily dismissed a purported appeal for want of a substantial federal question. That scenario creates no persuasive, let alone binding, authority for anything." *Nash v. City of Santa Monica*, 37 Cal. 3d 97, 112-13, 688 P.2d 894, 905 (1984), *appeal dismissed*, 470 U.S. 1046 (1985) (Mosk, J., dissenting). In any event, the ordinance challenged in *Callahan*, like the other cases relied on by petitioners, only protected certain tenants-in-possession from eviction and did *not* mandate that vacant units be subjected to coerced new tenancies. See *Callahan*, 464 U.S. at 875 (Rehnquist, J., dissenting from dismissal and concluding that the ordinance was a taking without just compensation because it was the equivalent of a "physical occupation" of the landlord's property); see also *Flynn v. City of Cambridge*, 383 Mass. 152, 418 N.E.2d 335 (1981) (same ordinance); *Benson v. Beame*, 50 N.Y.2d 994, 409 N.E.2d 948 (1980), *appeal dismissed*, 449 U.S. 1119 (1981).

⁸ As is argued in the Coalition's Petition at 29.

allegedly does not; and it inappropriately analogizes to Congress' right under its commerce power to enact legislation forbidding racial discrimination in places of "public accommodation" (i.e., hotels, restaurants, theaters). *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).⁹

In fact, the Coalition's argument proves too much—it is indeed *because* of the fact that respondents did *not* intend or desire to "open their property to the general public" that such cases as *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) and *Heart of Atlanta Motel, Inc.*, 379 U.S. at 241, are utterly inapposite herein. See *Nollan*, 483 U.S. at 832 n.1 (distinguishing *PruneYard* on the ground, *inter alia*, that "there the owner had already opened his property to the general public").¹⁰ Since, to the con-

⁹ *Heart of Atlanta*, in which this Court rejected a takings challenge to the Civil Rights Act of 1964 by a property owner who *voluntarily* operated a motel on his premises and actively solicited patronage therefor on a national basis but desired to continue to follow "a practice of refusing to rent rooms to Negroes," *id.* at 243, is utterly inapposite in the present context. Among other things, the taking claim in that case (summarily rejected by this Court in one sentence) was *not* treated as a "physical" taking claim at all but rather as a claim that the challenged law would operate as a *regulatory* taking by causing the owner economic loss (which claim was found to be invalid). *Id.* at 260-61. Obviously, if the owner of the Heart of Atlanta Motel had opted to go *out* of the motel business and wished to convert his property to other uses rather than give up his policy of racial discrimination, the Civil Rights Act would not (and could not) have compelled him to continue to rent rooms to *anyone* (and certainly could not retroactively have forced someone to whom he *sold* the property for redevelopment to continue the former use, as does Local Law 9 in this case).

¹⁰ In *PruneYard*, the owner of a 21-acre shopping center visited by 25,000 patrons daily (which included 5 acres of parking and 16 acres containing walkways, plazas, sidewalks and buildings occupied by more than 65 shops, 10 restaurants and a movie theater) sought to prevent the exercise of free speech rights (protected under the California Constitution) to circulate petitions in one of its common areas. 447 U.S. at 77-78. This Court correctly noted that the fundamental test of whether state enforcement of the free speech rights of others effected a "taking" of the shopping center owner's core property right to exclude others "requires an examination of whether the restriction on private property 'forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 82-83 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Because it was clear in that case that the

trary, respondents in this case never intended to "open their property to the general public" but rather, expressly intended to vacate the properties and convert them to other uses (*see* SR-8-9, SR-15), Local Law 9's destruction of their right to exclude others constitutes a compensable taking.¹¹

Further, this argument ignores the fact that *Loretto itself* was a case involving rental premises (an apartment house), *not* property reserved for Mrs. Loretto's "personal private use" (and also involved regulation arguably impacting on the "landlord-tenant relationship"). This Court made clear in that case that the physical occupation analysis applies equally to rental property as it does to any other property—observing that there was no reason "why a physical occupation of one type of property but not another type is any less of a physical occupation." *Loretto*, 458 U.S. at 439. Moreover, it is difficult to see how the *Kaiser Aetna* case, 444 U.S. at 164, involving the development by Kaiser Aetna (a commercial real estate developer, like respondents), as lessee

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owner could adopt "time, place, and manner regulations" that would minimize any interference with its chosen use of the property as a public shopping center, this Court found "nothing to suggest that preventing [the owners] from prohibiting th[at] sort of activity [would] unreasonably impair the value or use of their property as a shopping center." *Id.* at 83. Thus, under the particular circumstances presented, it held that there had clearly not been an unconstitutional taking in that case, and its decision was limited to the type of shopping center involved in that case. *See id.* at 96 (Powell, J., concurring in part and in the judgment).

¹¹ It must be noted that this argument is, in effect, focusing on a "regulatory taking" analysis of the owners' "investment-backed expectations" of keeping their property "private" (as opposed to being "open to the public"). Respondents' reasonable investment-backed expectations when they bought these former SRO properties—that they could *exclude* the general public from their property and convert it to other private uses—are in fact highly relevant to the regulatory taking analysis herein. *See infra* at note 19. However, such an analysis is *inherently inappropriate* in the context of a *per se* taking determination based on a physical occupation, where, this Court has long made clear, the Constitution requires just compensation *regardless* of the trivial size of the "taking," the state interests involved, or the "reasonableness" of the owner's expectations of a rate of return on the property. *See Nollan*, 483 U.S. at 831-32 (quoting *Loretto*, 458 U.S. at 434-35).

from the owner, of a 6000-acre residential subdivision, housing approximately 22,000 tenants and including at least 1,500 marina waterfront lot leases, additional non-waterfront lot leases, accommodations for pleasureboat owners who were not residents of the development but who paid fees for boating rights, and an on-site shopping center, *id.* at 167-68, can be construed by petitioners as involving property "reserved by its owners for personal private use."

When Seawall acquired its nearly vacant SRO properties in 1984, at a cost of millions of dollars, it did so with the intention of demolishing the buildings located thereon and erecting a major office tower on the site, in midtown Manhattan. (SR-8-9; see A-208-209.) It was Seawall's intention (and legal right) at the time it acquired the properties to reach arrangements with the few remaining tenants to vacate those units that were still occupied.¹² Instead, Local Law 9 would require that the few currently occupied units, plus the majority of now-vacant rooms, be kept in perpetual SRO occupancy at controlled rents, thus enlisting Seawall, against its will, in a business it had, and still has, no desire to be in. (SR-15.) Certainly, it never intended nor expected to be in the business of providing "public accommodations."

Petitioners further argue that under *Loretto*, 458 U.S. at 419, there is no physical taking resulting from Local Law 9 because "the owners retain the right to choose their tenants." (City's Petition at 12-13.)¹³ This is an utterly meaningless "distinction" under

¹²The record demonstrates that Seawall's purpose in acquiring its SRO properties for demolition and redevelopment was fully consistent with applicable law and supportive of the City's then existing housing policy, which sought to encourage the elimination of SRO housing. (See SR-567-71.)

¹³The City relies for this proposition on dicta contained in footnote 19 of the *Loretto* opinion, in which this Court noted that "the statute *might* present a different question" if it provided for the landlord's ownership of the cable installation, rather than for its ownership and control by the third-party CATV company. 458 U.S. at 440 n.19 (emphasis added) (see City's Petition at 12; see also Coalition's Petition at 28-29). Significantly, however, the City ignores the

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Loretto, which was properly rejected by the Court of Appeals. (A-26-27.) If Mrs. Loretto had been given complete freedom of choice as to *which* CATV companies could install their cables on her building against her will (rather than having the City decide which company would be granted the exclusive franchise to provide CATV in her neighborhood), the physical occupation resulting from the City's law requiring that she allow their intrusion on her property would clearly have been no less a taking. *See Loretto*, 458 U.S. at 424.

Finally, as to the assertions by petitioners that because Local Law 9 is "temporary in duration," it cannot effect a physical taking (City's Petition at 13-14; *see also* Coalition's Petition at 27-28, 33 n.13, 37 and 44), they are based upon a misinterpretation of long-standing eminent domain law and a blatant denial of the reality of the practical effects of Local Law 9, *in conjunction with other existing New York State laws*, upon respondents. The fact is that the operation of Local Law 9's rent-up provisions would compel Seawall to give up possession of its buildings to strangers (*i.e.*, new tenants) *indefinitely*, and perhaps forever, regardless of the fact that the Local Law purports to require legislative "extension" every five years. Firstly, as has consistently been ignored by petitioners, all new tenants will obtain possessory interests protecting them from eviction (as well as limiting their rents) under existing New York rent control or rent stabilization laws, which are often,

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Court's explanation in that same footnote of *why* the landlord's ownership of the cable might make a difference, *i.e.*, because then, "if the landlord wished to repair, demolish, or construct in the area of the building where the installation is located, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable." *Id.* (emphasis added). In the present case, by contrast, once *any* new tenant gains occupancy rights, Local Law 9, together with other laws, deprives the owner of the ability to deal with his property as he chooses. The significance placed by the *Loretto* Court on burdens placed by legislation upon a landlord's core property rights to demolish and/or construct buildings on his or her property is clearly relevant in the present case. *See also Nollan*, 483 U.S. at 833 n.2 ("[T]he right to build on one's own property . . . cannot remotely be described as a 'government benefit'."). (emphasis added).

practically speaking, *impossible* for a landlord to sever once acquired,¹⁴ *even if* the Local Law itself were to expire after five years without renewal. Secondly, in considering the potential life-span of this law, which could be extended every five years upon a finding of "necessity," the New York experience with 46 years of annual renewal of "emergency" rent control laws teaches that this so-called "stop-gap" measure must be deemed to be, essentially, of unlimited duration.¹⁵

3. This Court's Prior Decisions Fully Support the Determination Below That Local Law 9 is Facially Invalid As A Regulatory Taking

Petitioners essentially propose that, under the decisions of this Court, there are *never* appropriate factual settings for the determination of facial regulatory taking claims. (See City's Petition at 14-17; Coalition's Petition at 37-39; Individual Intervenors' Petition at 21-27.) They are plainly wrong. This Court's concern with "ripeness" in certain takings cases, stemming from the general rule that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary," *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981) (citations omitted), is based upon the fact that the federal courts, as courts of limited jurisdiction, must, under the "case or controversy" provision of the federal Constitution, decide only "concrete legal issues, presented in actual cases" where there has been "actual interference" with

¹⁴ Under rent control and rent stabilization laws, the vacating of dwelling units by their occupants usually occurs only through the slow process of attrition by death, changed circumstances causing a willingness to move, or through a negotiated buy-out for significant consideration paid to the tenants.

¹⁵ It should be noted that the suggestion by petitioners that there can be no such thing as a temporary physical taking (see City's Petition at 13-14) is, in any event, manifestly incorrect. See, e.g., *United States v. Pewee Coal*, 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (all dealing with questions of just compensation for temporary physical takings).

someone's rights. *Beacon Hill Farm Assocs. v. Loudoun County Bd. of Supervisors*, 875 F.2d 1081, 1082 (4th Cir. 1989) (quoting *United Public Workers v. Mitchell*, 330 U.S. 75, 89-90 (1947)). Such "ripeness" concerns are *only* relevant in takings cases which are predicated upon an "as-applied" challenge to legislation. See, e.g., *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-87 (1985); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). There is no question that this case, by contrast, presented a *facial* challenge to Local Law 9.¹⁶

Indeed, petitioners concede that the only issue properly before the Court of Appeals on this facial takings challenge was "whether the 'mere enactment' of the [regulation] constitute[d] a taking" of respondents' property. *Hodel v. Virginia*, 452 U.S. at 295 (quoting *Agins*, 447 U.S. at 260). (See Coalition's Petition at 38; Individual Intervenors' Petition at 22.) As this Court made clear as long ago as *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (relied on by petitioners herein) there is no problem of ripeness implicated by a property owner's failure to seek some allegedly available administrative exemption from a land-use regulation before bringing suit challenging its constitutionality, where the claim asserted is facial—i.e., that "the ordinance of its own force operates greatly to reduce the value of the [plaintiff's] lands and destroy their marketability" or that "the existence and maintenance of the ordinance in effect constitutes a present invasion of [the plaintiff's] property rights and a threat to continue it." *Id.* at 386 (emphasis added).¹⁷ As recently as 1987, this Court has

¹⁶ In any event, Article III surely could not be said to have barred, on "ripeness" grounds, the New York State Court of Appeals from determining the facial challenge made to Local Law 9 herein under the state Constitution.

¹⁷ It is highly significant to note that, in approving the propriety of facial attacks on land-use restrictions as confiscatory in the *Euclid* case, this Court defined the cause of action in terms of an ordinance's mere existence effectively constituting a present invasion of *the plaintiff's property rights* and operating to greatly reduce the value of *the plaintiff's lands*. *Id.* Clearly, such a plaintiff need *not*, as petitioners urge, prove that the challenged regulation also constitutes a present invasion of the property rights of each and every other landowner who may be

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reaffirmed that, notwithstanding its reluctance to render opinions on the constitutionality of land-use ordinances *as applied*, prior to their actual application to a specific piece of land, *see, e.g., Williamson County*, 473 U.S. at 186-87; *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348-49 (1986), a landowner *may* nevertheless properly "mount a facial attack on a land use regulation without first seeking a final determination of how the applied regulation will effect actual use of the property." *Beacon Hill Farm Assocs. v. Loudoun County Bd. of Supervisors*, 875 F.2d at 1084, (citing to *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987)); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 138-39, 423 N.E.2d 320, 326 (1981), *rev'd on other grounds*, 458 U.S. 417 (1982) ("As has long been recognized, administrative remedies provided by a statute need not be exhausted prior to the bringing of an action which challenges the enactment 'in its entirety' as unconstitutional"). (See A-61-63 n.14.)

To the extent that petitioners argue that the facial invalidation of Local Law 9 as an uncompensated regulatory taking was premature because respondents had not applied for "hardship exemption" pursuant to § 27-198.2(d)(4)(b) of the New York City Administrative Code (*see* City's Petition at 27), they also misconstrue the very essence of Seawall's claim asserted below: that the so-called "hardship" provision is itself inherently confiscatory on its face, denying Seawall economically viable use of its land by its

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conceivably affected thereby, and petitioners' reliance for such a proposition on the wholly unrelated case of *United States v. Salerno*, 481 U.S. 739 (1987) (involving a challenge to the federal Bail Reform Act as violative of Eighth Amendment) is misplaced. (See City's Petition at 14, 16; Individual Intervenors' Petition at 22-23.) *See, e.g., Hodel v. Irving*, 481 U.S. 704, 717 n.2 (1987) (statute facially invalid where each of the plaintiff's decedents "lost [a] stick in their bundles of property rights upon the enactment" thereof); *cf. Hodel v. Virginia*, 452 U.S. at 295-96 (facial takings challenge held ripe, but rejected on the merits where plaintiffs failed to identify any tracts of land which they owned which were alleged to be taken by the enactment at issue, and thus did not show required impact on *their own property*).

very terms.¹⁸ The text of the hardship provision may be found in the Appendix at A-275 through A-279. Examination of its terms reveals that the purported "reasonable rate of return" that it allegedly "ensures" (see City's Petition at 15; Coalition's Petition at 40-41; Individual Intervenors' Petition at 13) is neither "reasonable" nor "ensured." (See A-56-57.) Most critically, it wholly excludes any consideration of the owner's *investment* in the property or its fair market value at the time of purchase. (See A-211-215.) In Seawall's case it is clear that its original purchase price is the appropriate measure of the property's value against which the "reasonableness" or "economic viability" of the return allowed by Local Law 9 must be measured. Seawall purchased its properties in October, 1984. At that time, the properties were zoned for commercial use (and still are), and there was no moratorium on demolition or conversion. Thus, Seawall had a *reasonable* investment-backed expectation of its ability to redevelop the properties as of right, which Seawall paid for, and which must rightly be considered.¹⁹ By relying only on their current assessed value as *SROs*

¹⁸ As noted *supra* note 11, the existence of the "hardship" provision is irrelevant for purposes of the physical taking analysis herein. Moreover, as to their belated assertions of the need for further development of the record and the impropriety of the trial court's grant of summary judgment, petitioners are conveniently overlooking the plain fact that summary judgment was only granted by Justice Saxe below *after the City itself* moved therefor in "Action 2" of these consolidated actions (R. 858). It is hornbook law in New York that a motion for summary judgment "searches the record" and invites the court to award summary judgment to a nonmoving party where appropriate. See, e.g., *Lansing Research Corp. v. Sybron Corp.*, 142 A.D.2d 816, 819, 530 N.Y.S.2d 698, 701 (3d Dep't 1988) ("By initially seeking summary judgment, defendant exposed itself to a search of the record (see, CPLR 3212[b]; Siegel, NY Prac §282, at 239), and summary judgment could have been granted in favor of plaintiff even in the absence of its cross motion for the same relief.").

¹⁹ This Court has made clear, in *Kaiser Aetna*, 444 U.S. at 175, that cases in which "distinct investment-backed expectations" are defeated by regulation present an especially sensitive category of takings, akin to that of permanent physical occupation. Particularly where a government's regulatory action sharply reverses its prior stance, upon which an owner justifiably relied in investing in some particular advantage that the challenged regulation would eliminate or destroy, this special category of takings analysis is implicated. *Id.* Recently,

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as the benchmark against which the "reasonable rate of return" is to be measured, the value of the hardship exemption is set at a point of absurdity. Thus, under Local Law 9's formulation, as is explained below, an owner could receive a "reasonable" return on the property *valued as an SRO*, but this would still not represent anything even remotely resembling a fair return on his initial investment. (See A-35-36, A-56-57 n.13.) This renders the legislative scheme inherently confiscatory.

The "hardship" provisions purport to give petitioner Commissioner of the City's Department of Housing Preservation and Development ("HPD") the power to entertain and grant applications to reduce in whole or in part the amount of the payment required under the buy-out provisions, or the number of replacement dwelling units required to be provided under the replacement exemption, *but only if* he finds: (i) that the owner cannot make a "reasonable" return unless the property is altered, converted or demolished as prohibited by the Local Law; (ii) that neither the owner nor *any prior owner* intentionally managed the property to impair its ability to earn such a return; *and* (iii) that the requirement that all SRO units be replaced would substantially impair the feasibility of developing the property for any other use.²⁰ Under this provision, it is apparent that those who

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in its opinion in *Keystone*, 480 U.S. at 470, a *facial* takings challenge, this Court reaffirmed the relevance of this special takings category and made clear that it is *not*, as petitioners urge, applicable solely where regulation is challenged "as applied." *Id.* at 495 (quoting *Kaiser Aetna*, 444 U.S. at 175); see also *id.* at 498; *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226-27 (1986) (engaging in analysis of "interference with reasonable investment-backed expectations" in considering *facial* constitutionality of statute).

²⁰ The New York courts properly accepted Seawall's argument that the "hardship" provision is illusory due to the failure of the City to promulgate any regulations thereunder and the resulting unavailability of defined administrative procedures by which an affected property owner could seek partial or complete exemption from the Local Law's "buy-out" or "replacement" obligations. As an examination of the hardship provision clearly reveals, Local Law 9 itself provides *no* standards or guidelines for the exercise of the Commissioner's

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purchased old buildings in midtown Manhattan for site assemblage and office building construction are automatically excluded from "hardship" exemption, since almost *all* of those buildings were, prior to the passage of the law, operated with a view to permanently vacating the SRO units (in accordance with existing City policy and as the City then encouraged) and thereby "impairing" their usefulness as SROs. (See A-3, SR-567-71.)

The serious problem posed by the foregoing impediment to any "hardship" treatment, however, is dwarfed by the problem of the Local Law's definition of a "reasonable rate of return," which is defined in an inherently confiscatory way. The Court will note that Local Law 9 specifically states that "assessed value" is to be determined *without reference to any possibility of conversion or demolition*.²¹ The Court of Appeals correctly recognized that to calculate a reasonable rate of return on the basis of an assessment that ignores the value of the property based on the as-of-right non-residential use (which the Local Law prohibits), is itself confiscatory.

And further, lest any owner seek a ray of hope in the assessment procedures of the City, in which assessments are systematically revised to reflect the enhanced purchase prices paid by

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discretion thereunder. (See A-53 n.12.) Indeed, there were no regulations at all under Local Law 9 until this case was already on appeal to the Court of Appeals, and the belated regulations that *did* purport to become effective on February 13, 1989, do not contain *any* procedures or guidelines whatsoever for the award of "hardship" relief.

²¹ Local Law 9 provides:

The term "reasonable rate of return" is defined to mean a net annual return of eight and one-half percent of the *assessed value of the subject property without recourse to the alteration, conversion or demolition prohibited by subdivisions a and c of this section*. If [HPD] determines that the assessed value of the subject property has increased as the result of the sale of such property, [HPD] *shall disregard the increase in the assessed value resulting from such sale to the extent that [HPD] determines that the amount paid for the property at such sale was in excess of the fair market value of the property on the date of the sale if the property continued to be used for single room occupancy rental housing of the same type and quality after the sale.*

(A-277-278) (emphasis added).

developers for underlying lots, the law states that HPD should disregard any increase in the assessed value resulting from a sale to the extent that it is determined that such increase is attributable to the potential for redevelopment. In such case, the value is to be determined instead as if the property would continue to be used as an SRO.

Since it is undisputed that, in determining hardship, the City intends to use an assessment irrevocably and unalterably fixed and limited to use of the property as rent-regulated SRO housing,²² there would appear to be little doubt that HPD would have ample latitude under the Local Law to value the property low enough so that it would easily earn 8.5% of its "value" as an SRO.²³ Thus, Seawall would be forever condemned to conduct the SRO business. Conceivably, Seawall could sell the properties to a person content to engage in such activity, but such a sale would necessarily bring a price not too different from the value HPD would impose. Thus, the only way out of the municipal servitude improperly imposed by Local Law 9 might be abandonment of ownership or sale at a distressed price representing an insignificant fraction of what Seawall paid for the properties, in expectation of redevelopment, before the law was enacted.²⁴ The

²² For SRO units subject to rent stabilization, the New York City Rent Guidelines Board has awarded average increases for one-year leases of .8% per year over the past five years, while apartment rent increases averaged 5% per year. See N.Y.C. Rent Guidelines Bd. Hotel Orders Nos. 14-18; cf. N.Y.C. Rent Guidelines Bd. Apt. Orders Nos. 16-20.

²³ The City has conceded and acknowledged that real property in New York City is valued, for assessment purposes, at 45% of fair market value. Thus, the 8.5% return supposedly offered to owners is *not* 8.5% of their property's fair market value (as an SRO), but only 8.5% of 45% of fair market value, i.e., 3.825% of market value (as an SRO). (See A-56 n.13.)

²⁴ Moreover, even abandonment would not permit an owner to escape the affirmative obligations of the Local Law, since an owner would be subject to substantial financial penalties for failure to comply. In the case at bar, Seawall would be obligated to pay penalties of almost \$55,000 upon citation, if it fails to fix-up and rent-up its units within 30 days after the effective date of the law, and commencing ten days later, fines of \$27,500 per day could be imposed.

ability to abandon or sell at such a huge loss provides no "cure" for the Local Law's constitutional defects.²⁵

Petitioners rely upon inapposite cases to support their argument that the Court of Appeals' holding that Local Law 9 deprives respondents of economically viable use of their property conflicts with the decisions of this Court. For example, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) are both cases which fall within the long-standing "nuisance exception" to the constitutional just compensation guarantee, and are sharply distinguishable from the case at bar on that basis, since they involved classic and proper exercise of the states' police power to prevent activities that are tantamount to public nuisances.²⁶ Indeed, the nuisance exception was critical in determining the result in the case of *Keystone*, 480 U.S. at 470, as well. (See A-50-51.)

²⁵ As to the alleged "buy-out" and "replacement" exemptions, the Court of Appeals correctly held that since "the effect of the moratorium and anti-warehousing measures is unconstitutionally to deprive owners of their basic rights to possess and to make economically viable use of their properties, merely allowing them to purchase exemptions from the law cannot alter this conclusion. In effect, the city, in the buy-out and replacement exemptions, is saying no more to the owners than that it will not do something unconstitutional if they pay the city not to do it. But if the initial act amounts to an unlawful taking, then permitting the owners to avoid the illegal confiscation by paying a 'ransom' cannot make it lawful." (A-54-55.)

²⁶ It should be noted that petitioners' reliance on such early cases as these and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), is simplistic and inappropriate in this context, since, before *Agins v. City of Tiburon*, 447 U.S. 255 (1980), and the rest of the recent line of this Court's takings cases, the concept of determining whether the uses which remained to a property owner were "economically viable" did not yet exist—this concept "wasn't even mentioned by the Court until *Penn Central*." Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 Urb. Law. 735, 762 (Summer 1988). Because the constitutional test in use prior to that time contained only the single requirement that land-use regulation be enacted for a proper public purpose, rather than including the alternative of deprivation of economically viable use, such early opinions have little value in the current context. *Id.* at 763. See also *Nollan*, 483 U.S. at 834-35 n.3 (noting that *Goldblatt v. Hempstead* is "inconsistent with the formulations of our later cases").

The case most often cited in connection with the nuisance exception is *Mugler v. Kansas*, 123 U.S. 623 (1887), in which the owner of a brewery alleged an unconstitutional taking of his property by an amendment to the state constitution prohibiting the manufacture and sale of intoxicating liquors. This Court held in *Mugler* that, since the distiller's use of his property had been validly declared by the constitutional amendment to be "injurious to the health, morals or safety of the community," no compensable taking resulted from the state's termination of this "noxious use of [his] property, [which] inflict[ed] injury upon the community." *Keystone*, 480 U.S. at 489 (quoting *Mugler*, 123 U.S. at 668-69).

As this Court explained in *Keystone*, however, this distinct type of state action to abate a public nuisance has a "special status" in takings jurisprudence, which:

. . . can [be] understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.

Id. at 491 n.20.²⁷ The Court was careful to underscore the caveat that "[t]he nuisance exception to the taking guarantee is not co-terminous with the police power itself." *Id.* (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 145 (Rehnquist, J., dissenting)). Rather, it has long been recognized as a "narrow" exception, allowing the government the necessary latitude to prevent "a misuse or illegal use." *Curtin v. Benson*, 222 U.S. 78, 86 (1911) (cited in *Keystone*, 480 U.S. at 512 (Rehnquist, C.J., dissent-

²⁷ It must be noted, however, that this Court has *never* indicated that *all use* of an entire property could be prohibited without compensation based upon this theory, but rather, merely that a *particular activity* which constitutes a danger to others, or a "nuisance," may be prohibited.

ing)).²⁸ "It is not intended to allow 'the prevention of a legal and essential use, an attribute of its ownership.'" *Keystone*, 480 U.S. at 512.

Moreover, in contrast to the present case, the petitioners in *Keystone* lost on their facial regulatory taking claim because this Court found that they did not suffer any significant diminution in the value of their properties by reason of the challenged statute—there was simply no indication that the law made it impossible for them to profitably engage in their business or that there was any undue interference with their investment-backed expectations. *Id.* at 492-93. Significantly, this Court emphasized that the *Keystone* petitioners never even *claimed* that their mining operations were rendered unprofitable or commercially impracticable by the challenged law, and that, to the contrary, the record showed that, while the statute required that they leave *less than 2%* of their coal in place, *only 75%* of their underground coal could be profitably mined *in any event*. *Id.* at 495-96. Thus, the *Keystone* majority found no evidence of any material effect on the petitioners' investment-backed expectations, and accordingly held that they had not been denied economically viable use of their properties. *Id.* at 495-96, 499.²⁹

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978), was also a distinctly different case than the one at bar. Under the facts in *Penn Central*, this Court held that no taking had occurred by the landmarking of Grand Central Terminal un-

²⁸ By way of illustration, the nuisance exception has been applied to deny compensation for the diminution or destruction of value of such property as hazardous waste operations, brothels, unsafe buildings, fire and health hazards, gambling facilities, and "bawdyhouses." See *Keystone*, 480 U.S. at 492 n.22 (citations omitted). So far as Seawall is aware, real estate development has not yet been legislatively declared an illegal or noxious use.

²⁹ In the words of one commentator, "[i]n *Keystone*, the companies *conceded* that they had been operating profitably for twenty years under the regulations and that no individual mine was rendered unprofitable by the regulation. The High Court was thus unmoved by their asserted plight" Berger, *supra*, at 738.

der its regulatory taking test, primarily because the owners' existing use of the property was still economically viable (although less profitable than it would have been under their unsuccessful proposal to build a high-rise office building in the air space above the terminal), and the denial of permission by the City to build the office building *did not interfere with the owners' primary expectation of using the land as a railroad terminal*. See *id.* at 136-38. It was highly significant in *Penn Central* that the owners did not dispute the finding that they *could* in fact earn a "reasonable return" on their investment in the Terminal based on the land's existing use. *Id.* at 129 n.26. This distinction is critical to this Court's conclusion in *Penn Central* that the Landmarks Law did not result in a compensable taking, where it "not only permit[ed] but contemplate[d] that appellants [could] continue to use the property precisely as it ha[d] been used for the past 65 years" *Id.* at 136.³⁰ Moreover, unlike Local Law 9, the ordinance in *Penn Central* gave the property owners valuable transferable development rights, which they could use on other property or sell to others, in exchange for the development rights it "took" from them. *Id.* at 129.

Finally, the Court of Appeals' holding that the burdens imposed on respondents by Local Law 9 do not substantially advance legitimate state interests was not only consistent with, but was *required by*, this Court's decision in *Nollan*, 483 U.S. at 825.

³⁰ In light of the Terminal owners' concession that they were still able to make a reasonable return on their investment in the property, this Court's conclusion that the continuation of their present use left them with an economically viable property made sense in the *Penn Central* context. It does *not* make sense here, on the other hand, to reason, as petitioners do, that respondents have *ipso facto* not been deprived of economic viability because they are free to "continue" to use their properties as SROs, a use chosen and carried out in the past (unprofitably, see R. 708; SR-590) by others, and not, as in *Penn Central*, their own chosen and profitable long-standing use of the property. Furthermore, the Blackburn Report *itself* (the basis for all of Local Law 9's "findings of fact"), found that *SROs are not an economically rational use of valuable land* in midtown Manhattan (R. 732), due to, *inter alia*, City-wide market forces creating a rapid rise in the value of such real estate and making the only economically *rational* uses thereof dependent upon conversion or demolition of these buildings.

Clearly, "*Nollan* calls into question the legal propriety of shifting the burden of the cost of [a needed] public benefit to the 'last guy on the block' with a perceived deep pocket." Falik & Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction: in Land-Use Planning: A View From California*, 39 Hastings L. J. 359, 393 (1988).

This Court's opinion in *Nollan* proceeds from a recognition of the constitutional necessity of a substantial cause-and-effect "nexus" between the harmful impacts *created by* the development project being regulated, and the exactions or burdens being imposed thereon by the government regulators. See *Nollan*, 483 U.S. at 836-37.³¹ After *Nollan*, a heightened scrutiny of land use regulation is required, and in order to survive a Fifth Amendment taking challenge, an exaction must be *directly* related to amelioration of the adverse impact of the owner's proposed project and, moreover, "the adverse impact must be such that the regulator could have denied the permit outright." Berger, *supra*, at 751. In the words of the Court of Appeals, under *Nollan*, "the stark alternatives offered [to respondents] by Local Law No. 9—either submit to an uncompensated and, therefore, unconstitutional appropriation of your properties or pay the price (in cash or in replacement units)—amount to just the sort of exaction which could be classified, not as a valid regulation of land use but, 'an out-and-out plan of extortion.' " (A-55-56, quoting *Nollan*, 483 U.S. at 837 (citation omitted).)

Although petitioners attempt to say that respondents' redevelopment of their SRO properties will "cause" homelessness (see, e.g., City's Petition at 17, asserting that the law "alleviat[es] the harm [respondents'] development does to the people of New York City"), it is now clear that simply saying so is not enough to pass constitutional muster. As this Court declared in *Nollan*,

³¹ This theory is further elaborated upon in an extremely pertinent factual context in Justice Scalia's subsequent *Pennell* dissenting opinion. See 108 S. Ct. at 862-64.

"[w]e view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." 483 U.S. at 841. It is plain that the requisite causal nexus is lacking in this case, and that respondents have been unfairly forced to bear public burdens, not of their creation, by Local Law 9.

The City itself acknowledges that the decline in the number of SRO units in New York "may be attributed to previous City policies which reflected the then wide-spread opinion that such units were 'substandard' and resulted in legal restrictions on the development of new SRO units (see Administrative Code § 27-2077)", (R. 177), as well as encouraging the destruction of existing SROs through tax incentives and other means. (See City's Petition at 3.) Indeed, it might well be concluded that respondents can more fairly be said to be *eliminating* a "noxious use" of property by their plans to replace the antiquated and largely uninhabitable former SRO buildings on their properties with modern, useful, commercial and residential developments than they are in any way initiating one.³²

Moreover, contrary to petitioners' assertions, Local Law 9 is *not* necessary to protect any current SRO tenants from homelessness or from harassment. As petitioners are well aware, other New York laws exist to protect tenants against unlawful eviction practices. See *Sadowsky v. City of N.Y.*, 732 F.2d 312 (2d Cir. 1984) (upholding the City's SRO anti-harassment law). Respondents are obligated by existing rent control and rent stabilization laws,

³² The ultimately detrimental effect of the land use policy of Local Law 9 on City welfare is plain: the benefits to the City's real estate tax base which would flow from the hundreds of millions of dollars of commercial and residential redevelopment which Local Law 9 would prevent would clearly seem to outweigh the benefits of the relatively few SRO units preserved by the law. It is respectfully suggested that an alternative program which would permit the development of City real estate to its highest and best use, while earmarking the increased property taxes derived from such improvements for housing the homeless, would surely provide the financial underpinnings for a more rational and comprehensive City housing policy. (See R. 573.)

in the event they seek to vacate their buildings, to negotiate relocation agreements with such tenants (which will involve substantial and profitable compensation to those individuals). Thus, if the goal of Local Law 9 is, as the City claims, to *prevent* current tenants from becoming homeless, no adequate nexus can be shown between its means and its ends.

In addition, to the extent the City's goal is to increase the availability of affordable housing stock, the "logic" underlying Local Law 9 is revealed to be insupportable: if the City exacts so large an amount in exchange for allowing owners to redevelop their properties³³ that the owner cannot afford to pay, new development (including new *residential* development) becomes highly unlikely; and if the owner submits and *makes* the extortionate payment, not only does the City get a windfall, but, if the contemplated development is residential, the cost of available housing in the City will predictably increase.³⁴ On the other hand, to the extent the City's goal is to "preserve" existing SRO units affordable to the indigent population which has historically inhabited such "bottom-rung" housing, Local Law 9 doesn't effectively address that problem *either*—under the law's provisions, respondents could "rent-up" their units to *anyone*³⁵ or they could "replace"

³³ In Seawall's case for example, the cost of "buying-out" its buildings from under the yoke of Local Law 9 (at \$45,000 per unit, see N.Y.C. Admin. Code §§ 27-198.2(d)(4)(a)(i) and 27-198.2(h)) would be approximately \$5 million, an exorbitant amount by any standard. It is worth repeating here that, even with this enormous buy-out, Seawall would still not be free to evict its few current tenants, who are protected from eviction by other laws. Moreover, the exercise of the "option" to "buy-out" could nevertheless leave it in circumstances where such tenants refuse to negotiate relocation agreements, and Seawall is forced to maintain those units in perpetuity.

³⁴ It has been estimated that as much as 30% of the current cost of housing is directly attributable to land-use regulation. See Case & Gale, *Henry George Wouldn't Be Big On Today's Growth Controls*, Wall St. J., Mar. 3, 1988, §1, at 18.

³⁵ The City *itself* acknowledges that "these units will not have to be rented to homeless persons or to individuals of any particular social or economic status." (R. 449; see A-47-48.)

their units with non-SRO housing "affordable" to persons of "moderate" income. (N.Y.C. Admin. Code § 27-198.2(d)(4)(a)(ii); R. 153-54.) If they pay the \$45,000 per unit ransom under the buy-out provisions, the Local Law provides that the City will use these funds "for the preservation . . . of dwelling units for persons of low and moderate income" (N.Y.C. Admin. Code § 27-198.2(i); R. 156-57) (emphasis added). In sum, the Court of Appeals correctly held that Local Law 9 fails to meet *Nollan*'s requirement of a close nexus between the "means" and "ends" of a challenged land-use regulation.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in the briefs of co-respondents, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the
United States

October Term, 1969

Supreme Court, U.

FILED

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JOSEPH F. SPANIOLO, JR.
CLERK

THE CITY OF NEW YORK, *et al.*,
Petitioners.

-against-

SEAWALL ASSOCIATES, *et al.*,
Respondents.

THE COALITION FOR THE HOMELESS,
Petitioner,

-against-

SEAWALL ASSOCIATES, *et al.*,
Respondents.

RICHARD WILKERSON, EDGAR FERRELL,
FRANK ALICIA, TOM WILLIAMS, DANNY
BOGDURZZO and NICHOLAS TALLERICO,
Petitioners,

-against-

SEAWALL ASSOCIATES, *et al.*,
Respondents.

MEMORANDUM IN OPPOSITION TO PETITIONS FOR
WRITS OF HABEAS CORPUS TO THE NEW
JERSEY STATE COURT OF APPEALS

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NEW JERSEY BAR ASSOCIATION

QUESTION PRESENTED

Whether New York City Local Law No. 9 of 1987 (otherwise known as the "SRO Moratorium"), which compels owners of buildings to rent vacant units to people who have no present possessory or legal interests to the building (thereby depriving owners of their most basic property rights - - the right to possess, use and dispossess of it) constitutes a taking in violation of the Fifth Amendment of the United States Constitution.

IDENTITY OF RESPONDENTS

The following is a list of all the affiliates of Sutton East Associates-86 and The Channel Club:

Sutton East Associates

Sutton East Associates-88

Daed Realty Corporation

150 East 35th Street Associates

Ledemis Realty Corporation

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In The
Supreme Court of the
United States

October Term, 1989

THE CITY OF NEW YORK, *et al.*,
Petitioners.

-against-

SEAWALL ASSOCIATES, *et al.*,
Respondents.

THE COALITION FOR THE HOMELESS,
Petitioner,

-against-

SEAWALL ASSOCIATES, *et al.*,
Respondents.

RICHARD WILKERSON, EDGAR FERRELL,
FRANK ALICIA, TOM WILLIAMS, DANNY
SOGDIUZZO and NICHOLAS TALLERICO,
Petitioners,

-against-

SEAWALL ASSOCIATES, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR
WRITS OF CERTIORARI TO THE NEW
YORK STATE COURT OF APPEALS

STATEMENT OF THE CASE

A. THE NATURE OF LOCAL LAW NO. 9

Single room occupancy ("SRO") residential property in
New York City is subject to rent regulation under the New

York City Rent Control and Stabilization Laws. Under these laws, the owner is not required to rent vacant units. Buildings which become vacant can be demolished, subject to compliance with other State and City laws, and the underlying land may be put to other permitted uses.

The SRO Moratorium Law (Local Law No. 9), which was declared invalid by the New York State Court of Appeals, imposed a unique set of restrictions solely for SRO buildings. Those restrictions may be summarized as follows:

1. No unit is permitted to remain vacant: If, for any reason, a unit ceases to be occupied, it must be re-rented to persons who have no present possessory or legal interests at controlled rents (R. 48)¹

2. Vacant buildings formerly devoted to SRO use may not be demolished or converted to any other use (R. 42 - 43).

3. To obtain a release of a SRO building from the restrictions of Local Law No. 9, the owner must either:

- (a) Pay \$ 45,000.00 per unit to the City (the "buyout" provision) (R. 153 - 155), or

¹ The citations preceded by "A." refer to the Appendix to the Petition for Writ of Certiorari which was submitted by petitioner City of New York.

"R." refers to the pages of the Record on Appeal used at the Appellate Division.

"SR." refers to the Supplemental Record in the Court of Appeals.

(b) Construct or otherwise create replacement housing subject to the same legal requirements (the "replacement provision) (R. 153 - 155).

The amount of the buyout or the number of replacement units may be reduced if the owner obtains a "hardship" exemption. The exemption applies to an owner who is unable to obtain a net annual return on the building of at least 8 1/2% of the building's value assessed as a SRO residence (R. 155).

In sum, Local Law No. 9 imposes an affirmative mandatory directive to rent all vacant rooms, at controlled rents, to strangers who have no present legal or possessory interest. Once they become tenants, they are then protected from eviction by the New York City Rent Stabilization Law (N.Y.C. Admin. Code § 26-501, *et seq.*) and may stay indefinitely at legally regulated rents. Additionally, Local Law No. 9 requires that respondents Sutton East Associates - 86 and the Channel Club (collectively "Sutton East") be in a business (*i.e.*, renting SRO units) that they are not in and do not wish to be in.

On July 6, 1989, the New York Court of Appeals held that Local Law No. 9 "takes" property without affording owners just compensation, in violation of the New York State Constitution and the United States Constitution.

B. STATEMENT OF FACTS

In January 1985, Sutton East purchased, for substantial consideration, the property and building known as the Gracie Square Hotel (the "Hotel") located at 451 East 86th Street, New York, New York (SR. 340).

In April 1985, Sutton East purchased, again for substantial consideration, a series of parcels adjacent to the Hotel (SR. 340). Sutton East demolished the structures existing on the adjacent parcels and constructed a new residential condominium building (SR. 340). Channel Club is the owner and sponsor of that condominium building which is known as The Channel Club (SR. 339.).

At the time that Sutton East purchased the Hotel, it was operated as a residential hotel containing thirty-one SRO units. At the time that Sutton East purchased the Hotel, many of the units were vacant and had been vacant for as long as several years (SR. 341).

The Hotel is now completely vacant and has been vacant since October, 1986 (which is before Local Law No. 9 was enacted).

The income that Sutton East could derive from the rental of the SRO units in the Hotel would be grossly insufficient to provide Sutton East with an adequate return for the cost of acquisition and cost of maintenance of the Hotel (SR. 341 - 342). Indeed, any economically feasible development of the Hotel would necessitate major renovation or demolition of the building (SR. 341 - 342).

Accordingly, Sutton East never intended to offer the vacant SRO units for occupancy or to continue the tenancy of any persons residing at the Hotel except as required by the then applicable provisions of law (SR. 342).

Rather, Sutton East acquired the Hotel in order to develop the property (SR. 340 - 341). Sutton East did not buy the property so it could build a new luxury high-rise residential condominium building that would be adjacent to a dilapidated SRO. Sutton East also entered into an agreement with Channel Club granting Channel Club a permanent easement permitting Channel Club to incorporate two of the rear units on the first floor of the Hotel into the lobby of the condominium building (SR. 351).

After Sutton East purchased the Hotel, Sutton East entered into written agreements with the remaining eleven tenants occupying the units at the Hotel (SR. 316, 341). In consideration for substantial sums of money, each of the tenants voluntarily vacated and surrendered possession of their units and swore in an affidavit that Sutton East had not harassed the tenants, used force, interrupted or discontinued services or engaged in any other activity that would have the effect of obtaining vacant possession of a unit by anything other than a voluntary surrender of possession (SR. 316, 341).

Moreover, the New York City Department of Housing Preservation and Development issued, on August 25, 1987, a certification pursuant to New York City Administrative Code § 27 - 198 that there had been no harassment at the Hotel for a prescribed thirty-six month period.

SUMMARY OF REASONS FOR
DENYING THE WRITS

A writ of certiorari should be denied because this Court lacks jurisdiction to review the decision of the New York State Court of Appeals. The decision of the New York State Court of Appeals rests upon an independent and adequate state ground -- namely, the interpretation of the "takings" provision of the New York State Constitution (Article I, Section 7). That section provides that "[p]rivate property shall not be taken for public use without just compensation."

Even if this Court determines that there was no independent and adequate state ground, this Court should nonetheless deny the writs of certiorari because the New York State Court of Appeals determined that Local Law No. 9 did not substantially advance a legitimate state interest. All of the petitioners concede that, under this Court's decisions, a statute does not affect a taking if, *inter alia*, it substantially advances a legitimate state interest. The New York State Court of Appeals made a uniquely state factual determination that the local law did not substantially advance a legitimate state interest. This Court should defer to such a negative finding by a state court.

The writs of certiorari should also be denied because this case does not raise unique questions of law nor is the decision of the Court of Appeals at variance with this Court's decisions. At issue is whether the "anti-warehousing" provision of Local Law No. 9 (*i.e.*, the provision which compels an owner

to rent a vacant unit and thereby create a landlord-tenant relationship with a third-party stranger) constitutes a taking.

The Court of Appeals held that:

"... Local Law No. 9 has effected a *per se* physical taking because it 'interfere[s] so drastically' with the SRO property owners fundamental rights to possess and to exclude." (citations omitted)

(A. 28)

The decision of the Court of Appeals adheres to the consistent line of decisions of this Court which hold that when there is a physical trespass onto, and physical occupation of, private property as a result of government action, there is a "physical" taking.

Petitioner, the Coalition for the Homeless (the "Coalition") is incorrect in asserting that this Court's decisions on physical takings are restricted to real property devoted to personal use. The leading case, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), involved a residential rental building. The case of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) involved the development of a seaside marina for the benefit of thousands of homeowners adjacent to the bay.

Moreover, the Coalition and the municipal petitioners (hereinafter the "City") also incorrectly assert that the Local Law No. 9 is not a taking because it is not "permanent". First, this Court has found non-permanent occupations of property to be a "taking". Second, since any new occupant will be protected

under the local rent stabilization laws, the new occupant will be protected from eviction long after any expiration of Local Law No. 9. Additionally, pursuant to the stabilization laws, the occupant can "pass on" the right of continued occupancy to family members.

Finally, the Coalition and the City are incorrect in asserting that Local Law No. 9 is similar to other "rent regulatory laws" found valid by this Court. Local Law No. 9, unlike any "landlord-tenant" law ever presented before this Court, creates an affirmative obligation by the owner to rent property. In all other cases before this Court, the issue was the validity of laws that affected an existing landlord-tenant relationship.

The New York State Court of Appeals also correctly found that Local Law No. 9 constituted a "regulatory taking". Sutton East respectfully adopts the arguments asserted by its correspondents in this regard. However, Sutton East adds that the hardship provision under Local Law No. 9 is not, contrary to the assertions of the Coalition and the City, similar to the hardship provision under the New York City Rent Control Law. This is because under the Rent Control Law, there is a hardship if an owner cannot make a net annual return of 8-1/2% of the equalized assessed value.² Under Local Law No.

² "Assessed value" is the value of a parcel of real estate given to it by a local assessor. That value is the sum for which each separately assessed parcel of real estate would sell under ordinary circumstances if it were wholly unimproved; and separately stated, the sum for which the same parcel would sell under ordinary circumstances with the improvements, if any, thereon. N.Y. Real Prop. Tax § 522 (McKinney 1984)

"Equalized assessed value" is the value derived by a formula by which the assessed value is multiplied in order to create uniformity throughout the

9, the hardship standard is 8 - 1/2% of assessed value, assessed as a SRO. The standard under Local Law No. 9 uses an artificially depressed standard which makes it, on its face, virtually impossible for any owner to apply.

counties. Equalized assessed value is ascertained by multiplying the assessed value of the property by the state equalization rates which are the percentage of the full value at which the taxable real property in the municipality has been assessed. N. Y. Real Prop. Tax § 804 (McKinney 1984).

ARGUMENT

POINT I

THIS COURT LACKS JURISDICTION BECAUSE OF THE UNIQUE NEW YORK STATE INTERESTS INVOLVED

As noted in the Summary of Argument, there are two New York State interests involved which preclude this Court from taking jurisdiction over this case. First, the decision of the New York State Court of Appeals rested upon an independent and adequate state ground, namely the New York State Constitution. Second, the New York Court of Appeals found that Local Law No. 9 did not substantially advance a legitimate state interest. This is a unique state determination to which this Court should defer.

A. The Independent and Adequate State Ground

This Court has long relied upon:

"... the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [Supreme Court] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."

Tribe, American Constitutional Law (2nd Ed. 1988) at Section 3-24, p. 163, citing *Fax Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court reviewed the principles under which it will determine whether a

state court decision is based upon independent and adequate state grounds, thereby precluding Supreme Court review. The Court held that:

"If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance and do not themselves compel the result that the court has reached. In this way, both justice and administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide, separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."

Id. at 1041

The New York State Court of Appeals clearly stated that its decision was based on "bona fide, separate, adequate and independent grounds" from an interpretation of the Federal Constitution. *See, e.g.,* Decision at (A. 635 fn. 15).

Although the New York State Court of Appeals referred to several decisions of this Court, the New York State Court merely relied on those precedents "as it would on the precedents of all other jurisdictions." *Michigan v. Long, supra* at 1041.

Significantly, nowhere in the decision of the New York State Court did it state or imply that the takings clause of the New York State Constitution must be interpreted in the same

manner as the takings clause of the Federal Constitution. Indeed, in footnote- 15 at page 27 of the Decision, the New York State Court specifically recognized that the two Constitutions could be interpreted differently on this issue. The New York State Court merely found, however, that the two Constitutions were the same on this specific issue. Thus, the New York State Court did:

"... not [need to] decide the extent to which, if at all, the protections of the 'takings clause' of the New York State Constitution differ from those under the Federal Constitution."

Id.

Since the decision of the New York State Court is based upon an independent and adequate non-federal ground, this Court has no jurisdiction.

B. THE DETERMINATION OF STATE INTERESTS

All of the petitioners acknowledge that, under this Court's decisions involving "regulatory" takings, a statute "does not affect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Citing, *Nollan v. California Coastal Commission*, 483 U.S. 2d 825, 834 (1987); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987). Thus, a statute must meet both tests in order to not constitute a regulatory taking.

The New York State Court of Appeals found that Local Law No. 9 did not substantially advance a legitimate state interest. (A. 44)

No one -- including the New York State Court of Appeals, Sutton East and the other respondents -- disputes that "the end sought to be furthered by Local Law No. 9 is of the greatest societal importance -- alleviating the critical problems of homelessness." *Id.*

However, the New York State Court of Appeals determined that the means established by the local law did not advance that interest. (A. 44 - 45)

The determination by New York State's highest court regarding the nexus between the means and end is a unique state law determination to which, upon a negative finding, this Court must defer.

POINT II

LOCAL LAW NO. 9 IS A "PHYSICAL TAKING" OF PROPERTY WITHOUT JUST COMPENSATION

Local Law No. 9 is a "physical" taking because it requires Sutton East to permit third-party strangers to physically intrude upon and occupy its vacant building. Local Law No. 9 imposes an affirmative, mandatory duty to rent. Thus, Sutton East is required to allow strangers, who have no present legal or possessory interest, to physically intrude onto its vacant property and requires Sutton East to be in a business it is not in and does not want to be in.

This affirmative, mandatory directive to rent to third-party strangers is an unconsented to physical intrusion, by government direction, onto a person's property.

The New York State Court of Appeals concluded:

"Where, as here, owners are forced to accept the occupation of their properties by persons not already in residence, the resulting deprivation of rights in those properties is sufficient to constitute a physical taking for which compensation is required.

Under the traditional conception of property, the most important of the various rights of an owner is the right of possession which includes the right to exclude others from occupying or using the space." (citations omitted)

This Court has consistently held that such physical intrusions onto a person's property is a "taking" which must be compensated under the Fifth Amendment to the United States Constitution.

The bright line test established by this Court is simple: where there is an invasion and occupation of private property, there has been a compensable taking.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the owner of a residential apartment building was required by state law to allow a cable television company to install cable across the property. Although this Court characterized the intrusion as "minor," (*Id.* at 421), the Court held that the intrusion did constitute a physical occupation of property and thus constituted a taking.

In *Loretto*, this Court stated that:

"... we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause."

Id. at 426.

This Court further stated that:

"Moreover, an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property. . . . property law has long protected an owner's expectation that he will be relatively undisturbed at least in

the possession of his property."
(emphasis in original)

Id. at 436.

In *Nollan v. California Coastal Commission*, *supra*, the issue was whether a local government could condition the grant of a building permit upon the owner of beach front property agreeing to permit the public to traverse it in order to reach a public beach. This Court, utilizing a "regulatory taking" analysis, ruled that the government could not so condition the grant of a permit. However, before reaching that issue, this Court noted that:

"Had California simply required the Nollans to make an easement across their beach front available to the public on a permanent basis in order to increase public access to the beach... we have no doubt that there would have been a taking."

107 S. Ct. at 3145

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court found that the government's requirement that a real estate developer give public access to a private pond and marina would "result in an actual physical invasion of the privately owned marina." *Id.* at 176. The Court reasoned that to take away the right to exclude is to take away "one of the most essential sticks in the bundle of rights that are commonly characterized as property." 444 U.S. at 180.

Consistent with these decisions, the New York State Court of Appeals found that Local Law No. 9 was a physical "taking." The Court concluded that:

"Indeed, it is difficult to see how such forced occupancy of one's property could not [constitute a *per se* physical taking]. By any ordinary standard, such interference with an owner's rights to possession and exclusion is far more offensive and invasive than the easements in *Kaiser Aetna* or *Nollan* or the installation of the CATV equipment in *Loretto*." (Citations omitted.)

(A. 21 - 22)

Petitioners incorrectly allege that Local Law No. 9 is no different than other laws which regulate landlord-tenant relationships. In support of this allegation petitioners cite to such cases as *Pennell v. City of San Jose*, 485 U.S. 1 (1988) *Bowels v. Willingham*, 321 U.S. 503 (1944) *Block v. Hirsh*, 256 U.S. 135 (1921), *Callahan v. Fresh Pond Shopping Center Inc.*, 388 Mass. 1051, 446 N.E.2d 1060, appeal dismissed, and *Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 409 N.E.2d 948 (1980), appeal dismissed, 449 U.S. 1119 (1981), 464 U.S. 875 (1983).

However, petitioners fail to focus on the crucial difference which distinguishes these cases: that is, Local Law No. 9 does not regulate an existing landlord-tenant relationship. Instead, it forces the creation of an unwanted landlord-tenant relationship. Regulating an existing relationship which the landlord initially consented to is quite different from foisting upon an owner an unwanted relationship.

The argument advanced by petitioners was rejected by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, *supra*:

"In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party. Consequently our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mail boxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." (Emphasis added)

458 U.S. at 440.

The New York State Court of Appeals accepted this Court's analysis in so ruling:

"Those decisions have no bearing on the questions here - - whether forcing plaintiffs to rent their properties to strangers constitutes a physical taking...

The rent control and other landlord-tenant regulations that have been upheld by the Supreme Court and this Court merely involve restrictions imposing upon existing tenancies where the landlords had voluntarily put their properties to use for residential housing.

Unlike Local Law No. 9, however, those regulations did not force the owners, in the first instance, to subject their properties to a use which they neither planned nor desired."

Petitioners, also incorrectly argue that the Court of Appeals' application of the doctrine of physical takings to Local Law No. 9 was unwarranted because Local Law No. 9 purportedly is not permanent. (City's Petition at 13; Coalition Petition at 4-5.)

Petitioners fail to acknowledge that, although Local Law No. 9 provides that it may be renewed for five year periods if the New York City Council determines that the emergency which the law purportedly addresses still continues. There is no likelihood that the emergency (housing in New York City) will end in the foreseeable future. The housing emergency in New York has continued since the end of World War II -- more than forty years ago -- and continues today. (Act of March 30, 1946, Ch. 274, 1946 N.Y. Laws 723; Local Emergency Housing Rent Control Act, Ch. 21, 1962 N.Y. Laws 51; Emergency Housing Rent Control-Extension, Ch. 480, 1969 N.Y. Laws 754; Emergency Tenant Protection Act of 1974, Ch. 576, N.Y. Laws 769, Local Law 16 of 1969, Local Law 18 of 1988.)

Thus, it is likely that the "emergency" that is the basis of Local Law No. 9 will last indefinitely. Indeed, the New York State Court of Appeals so found:

"... while not specifically made permanent, Local Law No. 9 is, by its own terms, to remain in effect

indefinitely since its five year terms may be extended for additional terms without limit....

(A. 27 - 38, fnt. 5)

Further, Local Law No. 9 will adversely affect Sutton East's property long after any theoretical nonrenewal. The occupancy of any new tenant at Sutton East's vacant building will be governed by New York's rent stabilization laws. Those laws effectively permit any tenant to occupy Sutton East's property indefinitely (except for certain narrowly defined and applied circumstances). Rent Stabilization Code §§ 2523.5-2524 (codified at N.Y.C.R.R. Tit. 9, Sub. S, Ch. VIII), published separately in McKinney's, Unconsolidated Laws.

Moreover, a tenant may "pass on" the right to occupy his unit to a new tenant under the "Law of Succession" created under the State Regulations. *See*, 9 N.Y.C.R.R. § 2523.5.

Even if the offending law is "temporary," it still constitutes a taking for that limited period of time.

The New York State Court of Appeals stated that:

"... (2) even if Local Law be viewed as a temporary provision, it results in a deprivation of the owner's quintessential rights to possess and exclude and therefore, amounts to a physical taking. Under *First Lutheran Church*, ..., where, as here, the governmental action resulted in a *per se* taking, the offending action constitutes a taking for whatever time period is in effect."

(A. 28, fnt. 5)

Petitioners allege that the Court of Appeals mistakenly interpreted this Court's decisions in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 109 S. Ct. 2378 (1987) as holding that physical takings could be temporary (City's Petition at 13).

The fact that a physical taking could be temporary was already clearly decided by the time *First English Evangelical Lutheran Church, supra*, was decided. In fact, in *First English Evangelical Lutheran Church, supra*, this Court relied on such cases as *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946) and *United States v. General Motors Corp.*, 323 U.S. 373 (1945). Each of these cases involved appropriation of private property by the United States for use during World War II. All of these cases unequivocally involved physical takings. Additionally, all of these takings were in fact "temporary." Nonetheless, this Court held that there were takings for which compensation had to be paid.

"Though the takings were in fact 'temporary' [citation omitted] there was no question that compensation would be required for the government's interference with the use of property ..."

107 Sup. Ct. at 2387.

In *First English Evangelical Lutheran Church, supra*, this Court found that there is no constitutional difference between a "temporary physical occupation" for which

compensation must be paid and a "permanent physical occupation:"

"These cases reflect the fact that 'temporary' takings which, as here, deny a land owner all use of his property, are not different in kind from permanent takings, for which the constitution clearly requires compensation." (citations omitted)

107 Sup. Ct. at 2388

Petitioners also allege that Local Law No. 9 does not constitute a physical taking because there is no physical occupation of property. (City's Petition at 14). The mandatory requirement in Local Law No. 9 that an owner allow a third-party stranger to come on to his property and take up habitation is clearly an act of physical occupation. As stated by the Court of Appeals:

"The Law [Local Law No. 9] requires nothing less of the owners than 'to suffer the physical occupation of [their] building[s] by third part[ies].'" (citations omitted)

(A. 28 - 29)

This Court has not held, as asserted by the Coalition, that physical takings are restricted to those laws which effect personal privacy: that is, the property must be devoted to personal use.

The leading case of *Loretto v. Teleprompter Manhattan CATV Corp.*, *supra*, involved "a five story apartment building." 458 U.S. at 421. The physical occupation there was a small

cable which provided cable television services "to the tenants." *Id.* at 421 - 22. There is no indication that the plaintiff in *Loretto* even occupied any portion of the building at issue.

Kaiser Aetna v. United States, supra, involved a large marina development. The development, which included a large pond, was 6,000 acres. The developer had dredged and filled parts of the pond, erected retaining walls and built bridges within the development to create a marina and increased the depth of the channel so as to accommodate pleasure boats. At the time of trial, the community contained approximately 22,000 persons, 1,500 marina water front lot lessees, 86 nonmarina lot lessees, and 56 nonresident boat owners. *Id.* at 167 - 168.

Certainly, there were no "personal privacy" interests involved in *Kaiser Aetna* as asserted by the Coalition. Nonetheless, this Court found there to be a taking.

Furthermore, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980), are not at all relevant to the issue before the Court in this case.

In *Heart of Atlanta, supra*, the issue was whether the government could require a place of public accommodation to not discriminate. *Pruneyard Shopping Center v. Robbins, supra*, involved the issue of whether a shopping center, which had in effect become the "City Square" could prevent its invitees from exercising their First Amendment rights to free speech.

Unlike the Motel in *Heart of Atlanta* and unlike the shopping center in *Pruneyard Shopping Center*, Sutton East's

property is not a place of public accommodation. Rather, it is a private, vacant building.

The "buyout" and replacement provisions of Local Law No. 9 do not cure the taking caused by the law, contrary to the assertion of petitioners.

The argument that a law is not a taking because an owner can "buy out" of it, turns the law of takings on its head. When there is a taking, the government must provide just compensation to the owner, not the other way around. (United States Constitution, Amendment V).

If Sutton East wanted to "buy out" of Local Law No. 9, it would have to pay \$ 1,395,000.00 for the 31 units at its hotel. Requiring a property owner to "buyout" of the law "adds insult to injury" (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 436) to the taking committed by the government.

Thus, Local Law No. 9 is a physical taking of property.

POINT III

LOCAL LAW NO. 9 IS A REGULATORY TAKING

In order to avoid needless repetition, Sutton East adopts as its own the arguments advanced by co-respondents regarding the regulatory takings analysis.

Sutton East, however, wishes to show that the hardship provision of Local Law No. 9 does not cure the "regulatory takings" caused by Local Law No. 9.

The Court of Appeals held that even if Local Law No. 9 did not effect a physical taking, it would be facially invalid as a regulatory taking. The Court recognized that government regulation involves the adjustment of rights for the public good and that often such adjustment impairs some potential for the use or economic exploitation of private property.

However, the Court of Appeals recognized that some adjustments of rights may be too excessive. Specifically, the Court held that:

"... the constitutional guarantee against uncompensated takings is violated when the adjustment of rights for the public good becomes so disproportionate that it can be said that the governmental action is forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (citations omitted)

The Court of Appeals utilized the *Nollan* test in order to determine whether Local Law No. 9 constituted a regulatory taking. The *Nollan* test provides that a regulation of the use of private property will, without more, constitute a taking if:

(1) Either it denies an owner economically viable use of his property,

or

(2) If it does not substantially advance legitimate State interests.

(A. 30 - 31)

Satisfaction of either requirement is sufficient to invalidate a regulation. The Court of Appeals in applying the *Nollan* test to Local Law No. 9 held that "Local Law. No. 9 fails on both counts." (A. 31 - 32)

Petitioners claim that the hardship provision saves Local Law No. 9 because it was copied from the hardship provision of the rent control laws and those laws have been declared to be constitutional. (City's Petition at 15) However, such is not the case. The SRO hardship provision is entirely different from the rent control hardship provision.

Local Law No. 9 provides for a hardship if an owner cannot make a net annual return of 8 1/2% of the assessed value of the property disregarding any increase in the assessed value resulting from a sale if New York City Department of Housing Preservation determines that the amount paid for the property was in excess of the fair market value of the property

used for SRO purposes. (New York City Administrative Code § 27-198.2(d)(4)(b).)

Under the hardship provision of the rent control regulations (9 N.Y.C.R.R. § 2202.8), an owner can receive an increase in rent if he cannot make an 8 1/2% return on the equalized assessed value. (Section 2202.8(a)(4).)

The difference between the rent control regulations and Local Law No. 9 is that the assessed value of a property as a SRO is significantly lower than the equalized assessed value of that same property.

Thus, where it would be very difficult to make a net annual return of 8 1/2% of the equalized assessed value of a property, it would be almost impossible not to make a net annual return of 8 1/2% of the assessed value of a property as a SRO.

The assessed value of Sutton East's property before its purchase was \$165,000. The City undoubtedly will use that assessment as its base for determining whether there is a hardship. (Sutton East disputes that this is the proper base but assumes it for the sake of argument here.) Thus, in order to qualify for a hardship under Local Law No. 9, Sutton East must make a net return of no more than a mere \$14,025 (that is, 8 1/2% of \$165,000).

However, the current assessed value of the property (based on the 1988-89 assessment) is \$600,000. Utilizing the 1988-89 tentative City-wide equalization rate (32.49), the equalized assessed value is \$1,842,000. Sutton East must earn

net, more than \$ 156,570 (8 1/2% of the equalized assessed value) before it qualifies for a hardship increase under the rent control regulations.

Thus, as a practical matter, the rent control hardship is more than 10 times the amount of the hardship under Local Law No. 9.

This difference between the two hardship provisions is evident from the chart below:

<u>SRO Moratorium</u>		<u>Rent Control</u>
(Assessed Value as an SRO)		(Equalized Assessed Value)
Valuation	\$ 165,000	\$ 600,000
		(\$600,000 ÷ .3249
		[equalization rate])
		= \$ 1,842,000
8 1/2% of	\$ 14,025	\$ 156,570
Valuation		

Clearly the two are not the same.

By not using the current equalized assessment, the SRO Moratorium hardship effectively permits only a 2% return on assessed value (\$ 14,025 return on \$ 600,000 assessed value) and less than a 1% return on full equalized value.

Such low returns are no returns and are confiscatory.

In recognition of the multiplicity of briefs to be submitted, Sutton East will not further burden this Court by reiterating those arguments with respect to Local Law No. 9 being unconstitutional as a regulatory taking but instead incorporates those arguments as its own.

CONCLUSION

THE PETITIONS FOR WRITS OF
CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
October 31, 1989

Respectfully submitted,

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Nos. 89-388, 403, 552

Supreme Court, U.S.
FILED

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JOSEPH E. SPANIOLO, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1989

THE CITY OF NEW YORK, *et al.*,
Petitioners,
vs.

SEAWALL ASSOCIATES, *et al.*,
Respondents.

RICHARD WILKERSON, *et al.*,
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vs.

SEAWALL ASSOCIATES, *et al.*,
Respondents.

THE COALITION FOR THE HOMELESS,
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**Brief for Respondents 459 West 43rd Street Corp.,
Eastern Pork Products Company and Durst Partners
in Opposition to Petitions for a Writ of Certiorari to
the New York Court of Appeals**

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25 PP



Question Presented for Review

If this Court grants the writs of certiorari sought, the following question will be presented for review.

Is Local Law No. 9 of the Laws of The City of New York, 1987 ("Local Law No. 9") unenforceable as a taking of private property without just compensation in violation of the Constitutions of the United States and of the State of New York to the extent that it mandates owners of buildings containing single room occupancy dwelling units to rehabilitate and rent for an indefinite future period all present and future vacant units within thirty days at governmentally controlled rents unless the owner pays \$45,000 to the City of New York for each such SRO unit it wishes to keep vacant or builds alternative units and delivers them without profit or gain to governmentally designated entities or persons, on the ground that Local Law No. 9:

(a) is a per se violation of the takings clause because it denies the owners "the right to exclude others" from their properties in violation of the principles stated in *Hodel v. Irving*, 481 U.S. 704 (1987) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), or

(b) otherwise violates "[o]ne of the principal purposes of the Takings Clause [which] is to 'bar Government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as to whole.' " *Nollan v. California Coastal Commission*, 483 U.S. at 835, n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960))?

List of Parties

(a) Parties

The parties to the appeal before the Court of Appeals of the State of New York which resulted in the order which is the subject of the petitions for certiorari are: The City of

New York, Edward I. Koch, in his capacity as Mayor of the City of New York, Paul A. Crotty, in his capacity as Commissioner of the Department of Housing Preservation and Development of the City of New York, Charles Smith, in his capacity as Commissioner of the Department of Buildings of the City of New York, Richard Wilkerson, Edgar Ferrell, Frank Alicia, Tom Williams, Danny Sogliuzzo, Nicholas Tallerico and The Coalition for the Homeless, Seawall Associates, 459 West 43rd Street Corp., Eastern Pork Products Company, Durst Partners, Sutton East Associates-86, The Channel Club, Anbe Realty Co., Jambod Enterprises, Inc., Mygatt/Perry, Felix Ziade, Rocco Imperial and Testamentum.

**(b) Statement Pursuant to Rule 28.1
of the Rules of this Court**

459 West 43rd Street Corp. is a corporation incorporated under the laws of the State of New York. The shares of 459 West 43rd Street Corp. are not publicly traded and are solely owned by members of the family of the deceased Joseph Durst ("the Durst family"). 459 West 43rd Street Corp. has no affiliates whose shares are not also held entirely by the Durst family and it has no subsidiaries. Eastern Pork Products Company and Durst Partners are both partnerships organized under the laws of the State of New York, the interests in which are entirely owned by members of the Durst family.

Jambod Enterprises, Inc., Mygatt/Perry, Felix Ziade and Rocco Imperial were also represented by the attorneys for 459 West 43rd Street Corp., Eastern Pork Products Company and Durst Partners before the Court of Appeals of the State of New York but will not participate in the proceedings before this Court. Jambod Enterprises, Inc., is a corporation incorporated under the laws of the State of New York. To the best of our knowledge and information, it has no subsidiaries, parent companies or affiliates. Mygatt/Perry is a partnership organized under the laws of the State of New York engaged in the practice of architecture.

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In the
Supreme Court of the United States

OCTOBER TERM, 1989

THE CITY OF NEW YORK, *et al.*,
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**Brief for Respondents 459 West 43rd Street Corp.,
Eastern Pork Products Company and Durst Partners
in Opposition to Petitions for a Writ of Certiorari to
the New York Court of Appeals**

Introductory Statement

This brief opposes the petitions for a writ of certiorari submitted on behalf of the City of New York, its Mayor, Commissioner of the Department of Housing Preservation and Development, and Commissioner of the Department of Buildings ("the Municipal petition"), The Coalition for the Homeless ("the Coalition petition") and Richard

Wilkerson, Edgar Ferrell, Frank Alicia, Tom Williams, Danny Sogliuzzo and Nicholas Talerico ("the MFY petition").

The parties on whose behalf this brief is submitted are 459 West 43rd Street Corp. ("459"), Eastern Pork Products Company ("Eastern") and Durst Partners ("Partners"). The matter which is the subject of the petitions and this brief in opposition is *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059 (1989).

Statutes Involved

Local Law No. 9 appears at R 151 *et seq.*¹

Local Law No. 9 was enacted by the City Council of the City of New York on March 5, 1987. That ordinance established restrictions on certain owners of buildings in New York City which contained single room occupancy units. "Single occupancy units" ("SROs") are dwelling units which lack kitchens, bathrooms or both within the unit. The SRO units which are the subject of these restrictions do not include the thousands of such units owned by New York City or by various not-for-profit institutions. Generally, the limitations are only upon those units which are owned by private (*i.e.*, nongovernmental) citizens.

Local Law No. 9 declared it to be both illegal and a criminal act to demolish, alter or convert an SRO unit for a minimum five-year period, with provision for unlimited extensions of that moratorium for additional five-year periods. Under the terms of Local Law No. 9, all SRO units must be rented to tenants within 30 days. All SRO units which are presently vacant must be rehabilitated and made habitable. These too must be rented within 30 days.

¹ References preceded by "R" and "SR" are to the Record and Supplemental Record before the New York Court of Appeals.

All such rentals of SRO units are to be governed by the rent control and stabilization laws applicable in New York City. These laws limit the amounts of rent that can be charged and give each particular tenant the right to continue in possession of the unit indefinitely, without regard to the five-year period of the moratorium or any extension thereof. Failure or refusal of the owner to perform any of the foregoing is punishable by the imposition of substantial fines and criminal prosecution. The civil fines to be imposed are \$500 per SRO unit, commencing ten days after service of a notice of the violation, which penalty continues to accrue on a daily basis until cured. Local Law No. 9 presumes that if a SRO unit remains vacant for 30 days, the owner has violated the law.

If an owner of SRO units desires to use his or her property in any manner other than for SRO units, he or she must pay the City no less than \$45,000 per SRO unit to be freed from the restrictions of Local Law No. 9. Under certain circumstances, the owner may alternatively construct new residential units or buildings in lieu thereof and immediately turn them over to a not-for-profit entity approved by the City. In either event, the owners must relocate their SRO tenants if the tenant is willing to be relocated or if the tenant's consent can be purchased by the owner at whatever price the tenant demands.

Statement of the Case—

Eastern, 459 and Partners ("the Durst respondents") are each engaged in the business of acquiring real estate for development and sale. Each Durst respondent owns a building in Manhattan which contains SRO units. 459 owns a building known as the Hotel Diplomat located at 108 West 43rd Street. That property was acquired by an affiliate of the Durst family in 1970. At the time of its acquisition, it was operated as a residential hotel containing 216 units. It continues to be so operated. Of the 216

SRO units in the Hotel Diplomat, (a) 48 units are occupied by tenants covered by New York City's rent stabilization law, (b) two units are occupied by tenants covered by New York City's rent control law, (c) 56 units are occasionally let for transient use and (d) 110 units have long been vacant, uninhabitable and each would cost tens of thousands of dollars per unit to rehabilitate.

In 1986, Eastern purchased real property at 611 Ninth Avenue. Situated thereon is a three-story building which at the time of its acquisition was operated, and continues to be operated, as a multiple dwelling containing 18 SRO units. Eight such units are occupied by tenants protected by New York City's rent stabilization and rent control laws. The remaining ten units are vacant and uninhabitable.

Partners owns property at 147-151 West 43rd Street. The six-story building was acquired more than ten years ago and is entirely vacant.

Each of the foregoing properties was acquired for investment purposes before the enactment of Local Law No. 9. After analyzing the costs of rehabilitation, the likely rents to be earned in the event of the mandatory renovation, the "rent-up" and expenses of operation, it is estimated that the losses to the owners of the Hotel Diplomat would exceed \$754,486 a year. (SR 251-258). With respect to all of the presently vacant units, 611 Ninth Avenue would likewise lose \$61,994 annually on the units which would be the subject of the mandatory renovation and rent-up under Local Law No. 9 (SR 117, 258-261).

The history of SRO housing in New York City and its decline in numbers—a decline previously encouraged by all those who were interested in decent housing—is narrated in the City's own report, which was undisputedly the basis for Local Law No. 9. That report, prepared by Anthony J. Blackburn for the City in 1986, and entitled *Single Room*

Occupancy in New York City ("the Blackburn Report"),² states:

[P]ublic policy has been consistently hostile to single-room occupancy arrangements for almost half a century.

There have been several reasons for the efforts to curb the growth of single-room occupancies. First and foremost is the long-standing commitment of the housing and city planning profession to upgrade the housing stock through restraint on the development of "substandard" housing. The lack of full plumbing facilities within a dwelling unit has always been a key measure of substandardness in housing. Absence of cooking facilities and very small unit sizes also detract from the "quality" of the housing stock as traditionally defined. For very respectable reasons based on the long-standing commitment to the elimination of substandard housing, public policy has traditionally tried to control, and occasionally eliminate, single-room occupancy housing

The sordid conditions of many of the buildings, the outrage of local residents at finding themselves next door to concentrations of social misfits, and the commitment of the housing professionals to standard housing as a matter of principle evoked a forcible reaction from Judah Gribetz, an aide to Mayor Wagner . . . he railed against the SROs:

"The SRO should not be accepted as lawful housing for any segment of our citizenry. No community should equate such housing with the acceptable living standards of the 1960s. We should

² The Blackburn Report is part of the Record on Appeal before the New York Court of Appeals (R 673-808). Citations to the Blackburn Report will be made to the pages of that Record.

seriously consider the possibility of phasing the SRO out of existence by compelling its restoration to apartment use. . . . The SRO is a vestigial remnant of a past generation. Its history and use demonstrate that the time has come for the SRO to be regarded as extinct."

These sentiments found legislative expression in amendments to the Housing Maintenance Code which effectively prohibited further conversion to rooming units and . . . discourage[d] subdivision of buildings into rooming units.³

The Blackburn Report credits the City for the decline in SRO housing:

[T]he City's policy in the 1960s to retire the inventory of single room housing . . . was conspicuously successful. Since no new rooming units could be legally created, it was inevitable that the legal inventory would decline through conversion and abandonment.⁴

The recent decisions of City officials to safeguard single room occupancy housing in New York City are a testament to the indifference of that government to those who would dwell therein. They are also a testament to the local government's determination to avoid the political opprobrium associated with a general tax increase needed to help the impoverished. Justice Holmes has written "that a government ought not to be called 'civilized' if it sacrifices the citizen more than it can help."⁵ Under that test, the government that created Local Law No. 9 is uncivilized, both by reason of its failure to serve the poor as well as its

³ R 685-687.

⁴ R 688.

⁵ O.W. Holmes, *The Common Law*, at 37 (M. Howe ed., 1963).

effort to shift the burdens of housing the impoverished on to the respondents' shoulders.

Local Law No. 9 does not merely regulate relations between tenants and landlords, as do rent control and rent stabilization laws. *Bowles v. Willingham*, 321 U.S. 503 (1944). It also requires owners of SRO units to pay the City for the right to make free use of their properties. It requires owners of buildings containing SRO units to (a) "rent up" any vacant units they may possess ("the rent-up" or "anti-warehousing provisions"); (b) rehabilitate or repair such vacant units; and (c) if the property owner desires to leave the SRO business, or use his property in any other manner whatsoever, he or she must either pay to the City of New York \$45,000 per unit or provide for construction of new dwelling units in lieu thereof. Local Law No. 9 is thus fundamentally different from laws which merely seek to regulate rents or even to make indefinite the terms of residential tenancies.

The effect of the foregoing, particularly the "buy-out" or replacement provisions of Local Law No. 9, is to conscript the owners' properties for use as the City Council wishes, and, in addition, to compel the owners to engage in the SRO business for as long as the City Council so pleases.⁶

If those of the Durst respondents who own the Hotel Diplomat, a large property situated on West 43rd Street, wished to make economic use of this site, whether for residential or office use, they would have to pay the City at least the sum of \$45,000 per unit for each of 216 units, or replace those units in other locations at what is presumably a similar cost. The total amount due from such respondents would be \$9,720,000. If the entire vacant stock of privately owned SRO units in the City (5,200 to 7,000 units) were to

⁶ Section 7 of Local Law No. 9 provides that it is effective for five years and will continue to be effective for additional five-year periods thereafter if the City Council so extends it.

be so "ransomed" by their owners at the \$45,000 per SRO unit "buy-out" price, the City would realize for itself the tidy sum of \$315,000,000!⁷

The paying of such enormous sums to the City would still not supply owners with the key to their freedom. They must obtain possession of their units from the occupants thereof. With respect to the Hotel Diplomat, the Durst respondents would still have to buy out each of the 50 occupants who remain at the hotel, as well as the 166 occupants who would either replace the transient guests in the hotel or fill vacant rooms as a consequence of the mandated "rent-up." These requirements of Local Law No. 9 destroy any possibility of using the Hotel Diplomat in the future as anything other than an SRO hotel.

The Blackburn Report made it clear that City policy should favor requiring the owners of SRO units to so purchase their freedom. With admirable candor, Blackburn wrote:

The only way to secure the long-term availability of single room occupancy housing for low-income persons is to transfer the ownership of those properties from for-profit to non-profit entities and to establish the purposes for which they can be used by deed restrictions or similar devices. . . .

* * *

⁷ Contrast this cumulative cost of "buy-out" with the current financial plight of the SRO owners as described in the Blackburn Report:

The previous owners of single room buildings generally express the view that this form of housing is uneconomic, particularly in the light of rent regulation and the typically low income of tenants. Many of them left the business because of frustrations dealing with tenants who frequently had emotional and psychological problems, were in arrears with the rent and were difficult to evict for nonpayment or general property abuse.

R 708.

This can only be accomplished by both allowing buildings to be converted to more profitable use at a price which more than adequately compensates the city for the resulting loss of low-income units and/or by transferring ownership to non-profit entities which will operate the properties for the benefit of poor single persons.⁸

Local Law No. 9 is not truly directed at the problems created by the decline in numbers of SRO units. As we have seen, no civilized government official in modern history has ever wished to permit development of such substandard accommodations. The actual problem is the shortage of low and moderate income housing in the City of New York. Local Law No. 9 is intended to extract from the SRO owners substantial cash contributions to build or maintain housing units which hopefully will be affordable to citizens of modest means.

The reality is that Local Law No. 9 places a unique burden on only a small fraction of those owners whose properties are usable as lower income housing units. That burden is placed on them solely because their properties contain what are classified as "single room occupancy dwelling units." The far more numerous owners of properties which are also appropriate for use as "dwelling units for persons of modest incomes," however, are free to develop their properties without restriction. That freedom is the consequence of their having fortuitously not fallen within the SRO classification.

An irony of the situation is that the City of New York is the owner of the greatest number of vacant multiple dwellings in the City, including those containing SRO units. Yet, it has exempted itself from the requirements of Local Law No. 9. In the City's view, what is sauce for the unfortunate privately-owned goose is *not* sauce for the municipally-owned gander.

⁸ R 734, 737.

REASONS FOR DENYING THE WRITS

Introduction

The questions sought to be presented to this Court by the Municipal, Coalition and MFY petitions do not qualify under the rigorous standards of Rule 17.1 for review by this Court. The provisions of Local Law No. 9 are so unusually overreaching that review by this Court thereof would require devotion of substantial judicial and legal energies to consideration of what will ultimately prove to be episodic and fleeting. No other jurisdiction is likely to ever enact such oppressive restrictions on property use. Moreover, the rigorous features of Local Law No. 9 about which the respondents complain and which the New York Court of Appeals found abhorrent are, in major part, a function of the unique nature of New York's particular landlord-tenant and land use laws, not sufficiently national in interest to merit review by this Court.

Two more reasons exist for denying the petitions. The petitioners do not really argue that the highest court of New York State invented or misconceived the constitutional principles on which it based its decision. As we shall see, the Municipal, Coalition and MFY petitions merely contend that those previously enunciated principles were misapplied, a conventional argument invariably asserted by unsuccessful litigants and their counsel.

Finally, even cursory review of the petitions and the case below indicates that, contrary to the assertions of petitioners, the decision which is the subject of these applications was properly decided. It is the petitioners who misstate previous decisions of this Court and are in error, not the highest court of the State of New York which ruled against petitioners.

Before proceeding to the merits of the matter, we wish to take a moment to deplore the unseemly mischaracterizations made in the Coalition and MFY petitions, mischaracterizations which are particularly surprising in view of the

eminence of the advocates whose names appear on the petitions in question. It does little credit to its arguments for the Coalition petition to deprecate respondents as builders of "luxury housing" (Coalition Pet. at 9), suggest (contrary to everything in the record) that respondents have been in any way guilty of "harassment" of others (*id.*) or that they are collectively "a group of real estate developers" (Coalition Pet. at 7), as if respondents were less entitled to constitutional protection for that reason. Even more egregious is the MFY petition which inaccurately and impermissibly calls respondents "commercial real estate developers who wished to demolish or convert their buildings to luxury offices or residences" (MFY Pet. at 5-6), dismisses respondents as mere seekers after "speculative gain" (MFY Pet. at 8) and again falsely suggests that both the Court of Appeals and respondents ignore the rights of poorer citizens "driven out of their homes by absentee corporate owners of multiple dwellings who sought financial gain without considering its human costs" (MFY Pet. at 9).

Such mischaracterizations are inappropriate and reflect badly on the arguments made by those who see fit to pepper their petitions with such offensive materials.

I

The unique nature of both Local Law No. 9 and New York law of land use make this an inappropriate case for review by this Court.

The appeals which the petitioners seek to bring to this Court do not meet the criteria of Rule 17.1 on at least two grounds. First, Local Law No. 9 is so uniquely restrictive and extreme, and is recognized to be so restrictive by the petitioners themselves, that it is doubtful that any other jurisdiction will adopt such laws. "[T]he problem, though intrinsically important . . . [is not] . . . 'beyond the academic or the episodic.'" R. Stern, *Supreme Court Practice*

212 (6th ed. 1986) (quoting *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955)).

Each of the petitions for certiorari emphasizes in its "Questions Presented," as well as in the body of its arguments for review, that Local Law No. 9 is "emergency" and "temporary" legislation. Each thereby concedes the constitutional dubiousness of such a conscription of property owners into operating such a business under such constraints in ordinary circumstances (Municipal Pet. at 3, 21-22; Coalition Pet. at 6, 31-37; MFY Pet. at 4, 7). By so conceding that Local Law No. 9 is only justifiable as "emergency" or "temporary" legislation, petitioners implicitly admit that it can only be justified if it is seen as transitory. Permanent legislation with provisions such as those of Local Law No. 9 would apparently be unjustifiable, even adopting the views of the petitioners. Why after the highest court of New York has ruled on such ephemeral legislation, devoting substantial judicial energy thereto, should the matter not be allowed to rest? Certainly, this Court should not now devote its scarce resources to further review of such a matter. Enough judicial time has been devoted to resolution of an issue which "though intrinsically important" is also admittedly "episodic." R. Stern, *supra*, at 212.

Furthermore, the decision of the New York Court of Appeals invalidating Local Law No. 9 is based on the peculiarities of New York law. There is little reason for this Court to wrestle with a municipal ordinance, the effect of which is so intertwined with local issues of law and policy.

A basic assumption of the decision of the Court of Appeals in holding Local Law No. 9 to be unconstitutionally oppressive was that under New York law, "development rights" (*i.e.*, the right to erect substantial structures by assembling parcels of land) occupy a key place in the bundle of rights which constitute ownership of real property. Citing its own particular decisions to that effect, the Court of Appeals at 74 N.Y.2d at 109, 544 N.Y.S.2d at 550, 542 N.E.2d

at 1067, found that Local Law No. 9 "totally abrogated" such development rights and that under New York law such rights:

"are an essential component of the value of the underlying property" and that "they are a potentially valuable and even a transferable commodity and may not be disregarded in determining whether the ordinance has destroyed the economic value of the underlying property."

(quoting *Fred W. French Investment Company v. City of New York*, 39 N.Y.2d 587, 597, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976), *cert. denied* and *app. diss.*, 429 U.S. 990 (1976); and citing *Matter of Keystone Associates v. Moerdler*, 19 N.Y.2d 78, 278 N.Y.S.2d 185, 224 N.E.2d 700 (1967) and *Foster v. Scott*, 136 N.Y. 577, 32 N.E. 976 (1893)).

Few, if any, other jurisdictions so prize "development rights" as does New York, which refuses to permit their being disregarded in analyzing the constitutional propriety of local legislation as either a violation of constitutional due process or a wrongful taking. If this Court were to grant certiorari and review all or any of the questions raised in the petitions, it would be necessary, as part of the Court's review, to undertake an analysis of the New York law of development rights and the degree to which it assigns peculiar significance thereto in evaluating the property rights of owners of New York property. Such an analysis is hardly a matter of national interest.

Similarly, the draconian effect of Local Law No. 9 upon the unfortunate property owners who fall within its grasp cannot be understood without reference to the parochial New York laws of rent control and rent stabilization as well as the "temporary emergency" which has justified their continuation for the last half century.⁹ It is that strait-

⁹ *Benson v. Beame*, 50 N.Y.2d 994, 431 N.Y.S.2d 475, 409 N.E.2d 948 (1980), *app. diss.*, 449 U.S. 1119 (1981).

jacketing of rents, unique to New York, and the pretext that such restrictions will only continue until the alleged "emergency" is over, which effectively sentences owners of SRO properties under Local Law No. 9 to a lifetime occupation which they do not wish to undertake and which they cannot avoid in the absence of paying ransom for their properties or abandonment.

In summary, the decision of the New York Court of Appeals setting aside Local Law No. 9 is one which is both profoundly based on local conditions in New York itself and the remarkable features of that ordinance. In either case, it does not present an appropriate occasion for this Court to address the developing law of takings.

Given the details and unusual nature of Local Law No. 9, it may well be that in the efforts to obtain review, its invalidation should be considered along with the caveat that "hard cases often make bad law"—yet a further reason for denying the petitions for certiorari. This Court has often denied certiorari on the theory that definitive decisions on a developing area of law should "await the perspective of time," R. Stern, *supra*, at 214, or the work product of other courts. Such restraint is highly appropriate in dealing with such remarkably constraining legislation as Local Law No. 9. This is particularly so since that Local Law was challenged on grounds that it constitutes an impermissible "taking," an area of constitutional jurisprudence that itself is still developing. See "The Jurisprudence of Takings," 88 Colum. L. Rev. 1581 through 1794 (1988).

II

The petitions for certiorari merely argue that there has been a misapplication of principles established by this Court; such an argument is insufficient reason to grant review and, in any event, there has been no such misapplication presented.

R. Stern, *supra*, writes at page 203:

Lawyers, however, are likely to regard any case that they have lost in a lower court as necessarily in conflict with some Supreme Court decision or doctrine; that is what makes the ruling below arguably "erroneous." But such a loose reading of the Rule 17.1(c) reference to a decision "in conflict with applicable decisions of this Court" does not satisfy the Court's own understanding of what constitutes a conflict of this nature. To justify a grant of certiorari, the conflict must be truly direct and must be readily apparent from the lower court's rationale or result.

Examination of the petitions confirms that the substance of each petitioner's argument is that, in one way or another, the New York Court of Appeals failed to apply this Court's "takings" opinions as petitioners would like to see those opinions applied and also failed to understand the provisions of Local Law No. 9. For example, the Coalition petition states at pages 30-31:

The court below failed to analyze properly the character of Local Law 9, and it held erroneously that its mere enactment constitutes a regulatory taking because it denies the owners economically viable use of their properties, and does not substantially advance a governmental interest. In reaching such conclusion, the court misread prior decisions of this Court.

The Coalition petition does not contend that the principles of what constitutes a regulatory taking were ignored or erroneously restated by the Court of Appeals, only that they were erroneously applied. The same contentions are made by the Municipal petition. *See, e.g.,* Municipal Pet. at 8, 17.

Ironically, it is petitioners who misapply the principles already established by this Court in "takings" cases in their specious effort to persuade this Court that the decision sought to be reviewed is erroneous.

For example, the Municipal petition at page 13 inaccurately states that, because Local Law No. 9 purports to be a "temporary emergency" measure, it cannot be a "physical taking," describing as "unwarranted" this "expansion" of the holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). Presumably, the Municipal petition concedes that there can be a "temporary regulatory taking" after *First English*. No doubt the latter is true; however, the constitutional infirmity of uncompensated-for "temporary physical takings" long predates, and indeed was a basis for, the *First English* decision. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 317-18, citing and discussing as examples of "temporary physical takings," compensable under the Fifth Amendment, *United States v. Dow*, 357 U.S. 17 (1958), *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

The petitions also overlook the gravamen of the constitutional infirmities found by the New York Court of Appeals. Local Law No. 9 singles out a small class of real property owners to meet a particular burden of solving a social problem that is not necessarily related to any problem caused by those owners. Those real property owners are deprived of all development rights to their property, required to spend unanticipated sums to rehabilitate those properties,

and rent them up to tenants who will obtain rights of indefinite duration at limited rents under New York's rent stabilization and control laws. No showing is made that the particular persons who will become occupants of this SRO housing so created by Local Law No. 9 are the class of persons intended to be assisted (*i.e.*, the homeless).¹⁰ Nor are owners of other properties which could be used for solution of these social problems affected; only those who happen to own buildings with SRO units are required to participate in the rehabilitation and rent-up of their buildings and to continue doing so in the future. Owners of other structures equally amenable to low income occupants are unaffected by the ordinance even though there are no doubt hundreds of thousands of such units. In order to avoid this singular ordinance, only SRO owners, no other property owners, must buy freedom either at \$45,000 a unit or build alternative units at their own expense and turn those new units over, with no payment, to the municipality's designees. Otherwise, those SRO owners who "qualify" can obtain their freedom only upon proving that the owner is not earning a "sufficient" rate of return (*i.e.*, an artificially low rate of return on an artificially low assessed value of the property). In that event, the "buy-out" price *under certain circumstances* (not yet the subject of municipal regulations), *may be* reduced at the discretion of the City.

The foregoing insufficiency of relationship between the incidence of the burdens created by Local Law No. 9 with the

¹⁰ At pages 436-37 of the Supplemental Record, the attorneys for the intervenors in this case (here represented by the Coalition and MFY petitions) acknowledged that the rents to be charged for SRO units to occupants who as a consequence of Local Law No. 9 take possession thereof, although regulated, may still be too high for the homeless to pay. Consequently, the only effect Local Law No. 9 may have is to furnish housing to the middle class. Notwithstanding, the attorney justified the ordinance on the "trickle down" theory that if young middle class citizens were tempted to move into SRO units (ignoring the lack of bathrooms and kitchens), New York City's housing crisis might be eased and the impoverished move into what were the units occupied by those younger middle class individuals.

creation of the problem allegedly to be solved and the means to solve it, makes the Local Law a "taking" under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), as the Court of Appeals so found. *Seawall Associates v. City of New York*, 74 N.Y.2d at 106, 111, 112, 544 N.Y.S.2d at 548, 551, 552, 542 N.E.2d at 1065, 1068, 1069. Proposed destruction by Local Law No. 9 of two particular strands in the bundle of rights which constitute "property" under New York law—the right to be free of strangers and the right to develop—dictate the finding that Local Law No. 9 is an unjustified "taking" as described in *Hodel v. Irving*, 481 U.S. 704 (1987) and *Loretto v. Teleprompter, Manhattan Cable TV*, 458 U.S. 419 (1982), as also found by the Court of Appeals. *Seawall Associates v. City of New York*, 74 N.Y.2d at 102, 103, 104, 105, 106, 544 N.Y.S.2d at 546, 547, 548, 542 N.E.2d at 1062, 1063, 1064, 1065.¹¹

Finally, the basic unfairness of placing such a burden on a discrete class of owners, prohibiting them (in the absence of payment of ransom of huge proportions) from using their properties in any way *but the one way the municipal government directs*, violates the balancing approach set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), as also stated by the Court of Appeals. *Seawall Associates v. City of New York*, 74 N.Y.2d at 108, 111, 112, 544 N.Y.S.2d at 549, 551, 552, 542 N.E.2d at 1066, 1068, 1070. Nor can it be seriously believed that this ordinance is a mere regulation of prices or other economic incidents of rental accommodations, as was accepted in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), and as argued in the petitions.

¹¹ The Coalition petition at pages 22-24 makes the peculiar argument that governmental destruction of the right of property owners to exclude others is a "taking" only if "personal privacy" is involved. It thus claims that such a "right" does not exist in favor of commercial owners, landlords and developers. Unaccountably, the Coalition petition cites *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979), as authority for that position, overlooking the status of the owner in that case as a developer who successfully complained that its right to exclude the public from its development was being infringed.

Nothing in *Pennell* (or any other case cited by petitioners) even implies that the owners of properties can be so conscripted into such a business with no avenue of escape other than to buy themselves out or abandon their properties.

In short and in conclusion, the New York Court of Appeals has not misapplied any principles or authorities; its decision is one which this Court would, in any event, affirm. It is on this most fundamental level that we oppose the granting of certiorari in this matter. The result reached by the Court of Appeals was the correct result, one which should not be, and which we are confident will not be, disturbed by this Court.

CONCLUSION

The three petitions for certiorari should be denied.

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Respectfully submitted,

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